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**INTERNATIONAL CARRIAGE OF GOODS BY SEA:  
PROBLEMS IN BILLS OF LADING AND THEIR IMPACT IN AUSTRALIA  
AND ITS MAJOR TRADING PARTNERS IN ASIA**

by

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**Submitted in fulfilment of the requirements for the degree of  
Master of Laws  
University of Tasmania  
May 1999**

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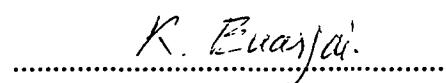
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## **DECLARATION**

- (a) This Thesis contains no material which has been accepted for the award of any other higher degree or graduate diploma in any tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except when due reference is made in the text of the thesis.
- (b) This Thesis may be made available for loan and limited copying in accordance with the *Copyright Act 1968* (Cth).

A handwritten signature in black ink, appearing to read "K. Euarjai", is written over a horizontal dotted line.

Krailek Euarjai

## ABSTRACT

This thesis examines problems of bills of lading in international carriage of goods by sea. The objectives of the thesis are twofold. The primary objective is the identification of major legal problems associated with bills of lading. The second objective is to evaluate the adequacy of bills of lading legislation in protecting the legitimate rights and interest of the parties.

Legal problems confronting bills of lading legislation are 'title to sue' and 'third party liability' which cause difficulties and obstacles to the legal function of bills of lading. Another problem in bills of lading concern marine cargo liability regimes. Under existing international law there is no uniformity in marine cargo liability regimes which results in a conflict of laws. Notwithstanding the entry into force of the United Nations Convention on the Carriage of Goods by Sea, the Hamburg Rules, in 1992, there is evidence that the Rules are not accepted by major shipping nations. Moreover, recent developments concerning electronic bills of lading play a vital part.

The thesis seeks to emphasise the problems which exist as a result of the inconsistencies between law and practice in this area. Attention is also drawn to the use of Electronic Data Interchange (EDI) as electronic bills of lading together with its legal aspects. The thesis argues that the entry into force of the Hamburg Rules, as a whole, did not provide significant changes in international carriage of goods by sea even though some countries, such as the People's Republic of China, had developed some concepts of the Rules. This argument is based on a number of factors including the principle of marine cargo liability, the current position of major shipping nations, and empirical evidence of the impact of the adoption of the Rules.

The conclusion of the thesis is that bills of lading legislative reform can eliminate major legal problem and sufficient enough to facilitate the use of electronic bills of lading. With regard to Australia, the Australian marine cargo liability regime have been improved to promote better balance of rights and liabilities between parties to a contract of carriage, and it becomes more compatible with those regimes of its trading partners.

## **ACKNOWLEDGMENTS**

I wish to thank my supervisor, Mr John Livermore, and head of department, Professor Don Chalmers for their valuable guidance, encouragement and assistance during this research. I would also like to thank Mr Gino Dal Pont and Mr Lynden Griggs for their helpful advice and assistance.

I am very grateful to the staff of the Law Library, University of Tasmania particularly Dr Stefan Pertrow (Law Librarian) for his assistance. I would like to thank the secretarial staff of the Law School, including Miss Rachel Davis and Mrs Sue Butterworth and Mr David McGuire for their assistance over the past five years.

I also would like to thank Mrs Robin Bowden, AusAID social worker, and staff of the International Students Office, University of Tasmania, including Mr Christ Street and Mrs Louis Oxley for their invaluable support.

Special thanks to my colleague, Mr Simon Marsden for his helpful comments and proof-reading of the thesis. Finally, I would like to thank my father and sisters for their love, encouragement, and help throughout my study.

## Select List of Abbreviations

C. & F.	cost and freight
C. I. F.	cost, insurance, freight
CMI	Comité Maritime International
EDI	Electronic Data Interchange
F. O. B.	free on board
MLAANZ	Maritime Law Association of Australia and New Zealand
SDR	Special Drawing Right
UN/EDIFACT	The United Nations Rules for Electronic Data Interchange for Administration, Commerce and Transport
UNCITRAL	The United Nations Commission on International Trade Law

## INTRODUCTION

### 1. Thesis Topic

Bills of lading are negotiable documents which perform both legal and commercial functions in international trade; bills of lading not only transfer legal rights between parties but operate to exchange commercial value between nations. Bills of lading have been used as a major instrument of international carriage of goods for the last two centuries.<sup>1</sup> Problems associated with bills of lading are both legal and commercial. Legal problems arise from the interpretation of these documents and such problems are exacerbated by differences between the legal systems which use them. Equally, legal disputes involving bills of lading often disguise underlying disputes about trade between vying commercial nations. This thesis is concerned principally with legal problems related to bills of lading. The purpose of this thesis is outlined in two subsections below.

#### 1.1 Objectives

The objectives of the thesis are twofold. The primary objective is the identification of major legal problems associated with bills of lading. An ocean bill of lading has three major functions; it acts as a receipt for the cargo carried, as a contract or evidence of the contract of carriage, and as a document of title to the goods,<sup>2</sup> and therefore, entitles its holder to sell and

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<sup>1</sup> See generally, D. E. Murry, 'History and Development of the Bill of Lading' (1983) 37 *U. Miami L. Rev.* 689; W. Tetley, *International Conflict of Laws: Common, Civil, and Maritime* (1994) 291; J. C. Sweeney, 'UNCITRAL and the Hamburg Rules—The Risk Allocation Problem in Maritime Transport of Goods' (1991) 22 (3) *J. Mar. L. & Com.* 514; and UNCTAD Report. Doc. No. TD/B/C.4/ISL/6 of 14 Dec. 1970.

<sup>2</sup> M. Davies and A. Dickey, *Shipping Law*, (1990) at Chapter 10; C. Debattista, *Sale of Goods Carried by Sea*, (1990) at Chapter 2; Scrutton, *Scrutton on Charterparties and Bills of Lading*, (20th ed., 1996); *Carver's Carriage by Sea* (13th ed., 1982, by R. Colinvaux); P. Todd, *Modern Bills of Lading*, (2nd ed.,

transfer property of the goods to a third party upon transfer of the bill. In performing its functions, legal issues arise and cause difficulties to all parties to the bill of lading, particularly to its holder. These legal issues lead to litigation and may have different results in different jurisdictions.

The second objective is to evaluate the adequacy of bills of lading legislation in protecting the legitimate rights and interest of the parties, including third parties, to a contract of carriage.<sup>3</sup> This evaluation also covers the recent legislative reform of bills of lading in Australia, and proposals to reform in certain countries, to examine those developments as to whether they can overcome all identified problems. This evaluation sets up questions as follows;

- Have major legal problems in bills of lading been eliminated?
- Have marine cargo liability regimes been improved to promote a better balance of rights and liabilities between parties to a contract of carriage?
- Are bills of lading legislation sufficient enough to facilitate the use of electronic bills of lading?

## **1.2 Limitations on Thesis Topic**

While bills of lading have both legal and commercial functions, the key aspect of this thesis is its focus on the legal problems related bills of lading for international carriage of goods by sea. Some issues related to the commercial function of bills of lading have been examined but their analysis fall beyond the scope of this thesis.

This thesis focuses on an examination and analysis of central problems concerning bills of lading in the context of international law and the

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1990).

<sup>3</sup> Parties to a contract of carriage are a carrier and a shipper. The term 'carrier' throughout this thesis refers to the owner or the charterer of a ship who enters into a contract of carriage with a shipper. Third parties to a contract of carriage may include; servants, agents, and sub-contractors of the carrier.

common law. This is because, first, international law is the primary source of law governing the issues at international level; and second, most of the decisions relating to bills of lading problems and customary practice have been developed by courts and commercial practice within common law jurisdictions, and in particular the United Kingdom. However, comparative references will also be made to civil law jurisdictions.

## **2. Methodology**

This thesis takes the form of an analysis of the research topics. The analysis comprises of a literature review and a comparative research in the area of marine cargo liability regimes between Australia and its major trading partners.

The objective of the analysis is to identify the essential legal problems in bills of lading. The relevant law is drawn from legislation and common law principles in contract. The analysis also focuses on the recent legislative reform of the bills of lading at both domestic and international level.

The first two chapters provide the fundamentals for the discussion, commencing with historical development and legal aspects of bills of lading. The next two chapters analyse problems in bills of lading legislation. Chapter V examines recent reform of bills of lading legislation in order to overcome the legal problems.

Chapter VI is concerned with recent developments concerning electronic bills of lading. The analysis focuses on legal obstacles to the use of Electronic Data Interchange (EDI) and the model law set by international organizations in order to support and facilitate the use of electronic bills of lading. Chapter VII contains a comparative study of the marine cargo liability regimes between Australia and its major regional trading partners.

### **3. Themes of Thesis**

In this thesis, the substance of the analysis is restricted to issues arising from bills of lading legislation. These issues take the form of *themes* underlying the substantive legal analysis which include:

- Legal problems confronting bills of lading legislation,
- Marine cargo liability regimes, and
- Recent development concerning electronic bills of lading.

#### **3.1 Legal Problems Confronting Bills of Lading Legislation**

Contractual relationships revolving around bills of lading involve not only the contract of carriage but also a number of others, such as, carriers' sub-contracts with third parties, insurance and finance. The relationships between all parties concerned are complex as a result of these linked contracts and bills of lading are at the centre of these relationships.

In analysing the legal problems, the thesis commences with an examination of functions of bills of lading, then a wider judicial review of bills of lading legislation is undertaken. It examines a close relationship between bills of lading legislation and the doctrine of privity of contract, and identify legal issues, including;

- **Title to sue** – right of suit in respect of carriage of goods by sea which raises by statute and implied contract<sup>4</sup> a number of complications between the doctrine of privity of contract and bills of lading, and the position of a consignee to sue carriers.

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<sup>4</sup> Section 1 of the *Bills of Lading Act 1855* (U.K.) and similar provisions in Australian bills of lading legislation, such as the *Bills of Lading Act 1857* (Tas), and by the implied contract rule in *Brandt v. Liverpool, Brazil & River Plate System Navigation Co. Ltd.* [1924] 1 KB 575. See *Rights of Suit in Respect of Carriage of Goods by Sea*. Law Commission (England and Wales) and Scottish Law Commission. London: H.M.S.O., 1991, 5.

- **Third parties liability** – problems as to whether the limitation of carriers' liability by exemption clauses in bills of lading can be extended to protect servants, agents or subcontractors of carriers. Do agents or subcontractors of the carriers have a responsibility to the consignees if the goods are lost or damaged while in their custody?

### 3.2 Marine Cargo Liability Regimes

Cargo liability regimes deal with the rights and obligations of the parties to a contract of carriage, principally carriers and shippers, but also the insurers, indorsees of bills of lading or consignees holding bills of lading. A marine cargo liability regime sets minimum standards of legal responsibility for cargo loss or damage while in transit and applies to carriers' contracts of carriage under statute law, or by incorporation into bills of lading.

In exploring the problem arising from marine cargo liability regimes, a comparison of two major regimes, the Hague-Visby Rules and the Hamburg Rules,<sup>5</sup> is undertaken. The examination focuses on legal context of the regimes, the balance of rights and liabilities of carriers and shippers, the effect of the Hamburg Rules, and marine cargo liability regimes which are now considered in a state of disuniformity.<sup>6</sup>

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<sup>5</sup> The International Convention on the Unification of Certain Rules of Law Relating to Bills of Lading of 1924 'the Hague Rules', the Hague Rules as amended by the Visby Protocol, known as 'the Hague-Visby Rules', or the United Nations Convention on International Carriage of Goods by Sea of 1978, 'the Hamburg Rules'.

<sup>6</sup> See for example; W. Tetley, *International Conflict of Laws: Common, Civil and Maritime*, (Montreal, 1994) Chapter X and Chapter XVI; B. W. Yancey, 'Symposium on American and International Maritime Law: Comparative Aspects of Current Importance: The Carriage of Goods: Hague, COGSA, Visby, and Hamburg' (1983) 57 *Tul. L. Rev.* 1238; D. M. Collins, 'International Uniformity and the Carriage of Goods by Sea' (1985) 60 *Tul. L. Rev.* 165; S. R. Mandelbaum, 'Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions' (1996) 23 *Transp. L. J.* 471.

### **3.3 Developments Concerning Electronic Bills of Lading**

A computerised system, known as 'Electronic Data Interchange (EDI)', has been introduced as a new mode of communication and it can be used as an electronic bill of lading. A number of questions, however, have been raised as to whether an EDI system can overcome the legal difficulties relating to bills of lading.<sup>7</sup> For example, how may two parties enter into a contract of carriage and arrange for transportation without signing a written contract or a written shipping document, and how may the proposed computerised document be enforced by the courts?

This thesis discusses the legal obstacles to the use of EDI systems for electronic bills of lading, in particular, problems concerning the function of paper bills of lading as a negotiable document of title. The legal obstacles to the use of EDI in international carriage of goods by sea are outlined as follows;

- Developments and legal aspects of EDI
- EDI: The legal problems
  - The requirement of a document
  - Document of title and negotiability
  - Signature and other authentication
  - Evidential value of EDI messages
- EDI and the functional equivalence approach

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<sup>7</sup> See for example; J. Y. Gliniecki and C. G. Ogada, 'The Legal Acceptance of Electronic Documents, Writings, Signatures, and Notices in International Transportation Conventions: A Challenge in the Age of Global Electronic Commerce' (1992) 13 *J. Intl. L. Bus.* 117, R. Hill and I. Walden, 'The Draft UNCITRAL Model Law for Electronic Commerce: Issues and Solutions' (1996) 13 *Computer Lawyer*, 18, B. Wright, *EDI and American Law A Practice Guide* (1989), and *Code of Practice for Electronic Data Interchange (EDI)*, Electronic Data Interchange Council of Australia, (1993)

# CHAPTER I

## INTERNATIONAL LEGISLATION RELATING TO BILLS OF LADING

### Introduction

An ocean bill of lading is a very important shipping document and the most common form of maritime contract. In international trade where ocean transport is conducted between ports of different countries, bills of lading ‘assume an international character, making them a fecund source of conflict of laws.’<sup>1</sup> At present, the use of bills of lading in international carriage of goods by sea is mainly governed at law by one of the three international bills of lading conventions, the Hague Rules (1924), the Hague-Visby Rules (1968), or the Hamburg Rules (1978).

The International Convention on the Unification of Certain Rules of Law Relating to Bills of Lading was adopted in 1924 in Brussels and is generally known as the Hague Rules. The Hague Rules were amended by the Visby Protocol of 1968 and the SDR (Special Drawing Right) Protocol of 1979. The provisions of the convention are applied world-wide. They have been ratified or otherwise adhered to by seventy-seven States and applied to trade with non-contracting States by virtue of the so-called ‘paramount-clause’.

The Hague Rules are now over seventy years old. Since their adoption in 1924, a number of conditions and facts have changed. In particular, worldwide inflation and the technological development of shipping, the latter both in the technical and the documentary areas, are the most important factors. As a result, a new United Nations Convention on International Carriage of Goods by Sea, known as ‘the Hamburg Rules’, was adopted in

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<sup>1</sup> W. Tetley, *International Conflict of Laws: Common, Civil, and Maritime* (1994) 291.

March 1978. It was, and is, intended to replace the present legal regime based on the Hague Rules. The object of the Hamburg Rules is to make a fairer balance between carriers and shippers in the allocation of risks, rights and obligations with regard to liability. These rules shift the balance of liability from the shipper to the carrier mainly by eliminating the so-called nautical fault defence.

The Hamburg Rules have been ratified by twenty States and came into force on November 1, 1992. As a result of this, at present the international community a choice between the Hague or Hague-Visby and Hamburg Rules' regimes which govern the responsibility of ocean carriers.

This chapter reviews the history and development of bills of lading. The discussion focuses primarily on a comparison and evaluation of the provisions of the Hague-Visby and Hamburg Rules governing the carrier's liability. It can be divided into two parts. Part I deals with; firstly the historical development of International Conventions relating to bills of lading, and secondly a comparison of the Hague-Visby and Hamburg Rules. Part II considers the economic and commercial implications of the entry into force of the Hamburg Rules and the present position of liability regimes in international practice.

## Part I

### History and Development of the Bill of Lading

Carriage of goods by sea is an important mode of transportation for trading between countries all over the world, because in this way a large amount of cargo can be carried at low cost. For some countries it is the most convenient way of transportation. In the early history of carriage of goods by sea, the contract of carriage was often an oral agreement between the shipowner and the cargo owner. Shipowners and cargo owners developed the principal rules related to their contracts of carriage over the centuries

and early maritime law made the carrier absolutely responsible for the safe arrival of carriage.<sup>2</sup>

A major development occurred when the master was allowed to deliver the goods to the consignee named in the receipt. The consignee was regarded as the representative of the cargo owner, but in fact the consignee became the merchant who had purchased the goods from the cargo owner. By the eighteenth century this receipt had developed into a document known as a 'Bill of Lading' which performed three functions, namely, a receipt, evidence of contract and document of title.<sup>3</sup>

At that time, bills of lading were brief and uncomplicated. The terms of bills of lading became more diverse because there was no uniformity. Moreover, according to the common law principle of freedom of contract, which allows the parties to contract on whatever terms they please, shipowners could take advantage by including exemption clauses in their bills of lading to avoid the rules of strict liability. In this way shipowners could limit their liability as widely as their bargaining position would allow.

The issue that has been disputed historically is the extent of the carrier's liability to the consignee of the goods or to the buyer of the bill of lading based upon the carrier's issuance of the bill. The issue of the carrier's liability for misrepresentations in the bill of lading arises in two factual situations:

1. when language in the bill purports to limit the carrier's liability for misrepresentation of the nature, quality, or quantity of the goods, and
2. when the carrier has entered into an indemnity contract with the shipper by which the latter agrees to protect the carrier against claims based on an inaccurate bill of lading.<sup>4</sup>

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<sup>2</sup> Caver's *Carriage by Sea* (13th ed., 1982, by R. Colinvaux) 2-19.

<sup>3</sup> S. Mankabady, 'Comments on the Hamburg Rules' in S. Mankabady (ed.), *The Hamburg Rules on the Carriage of Goods by Sea* (1978) 28.

<sup>4</sup> D. E. Murry, 'History and Development of the Bill of Lading' (1983) 37 *U. Miami L. Rev.* 689.

It should be noted that shipowners have always been very well organised. In 1855 the Shipowners' Mutual Protection Society was established in England in order to protect shipowners' interest in the field of insurance. Later on the first modern Protection and Indemnity Club (P & I Club), the Steamship Owners' Mutual Protection and Indemnity Association, was formed in 1874.<sup>5</sup> Thereafter, shipowners usually had more bargaining power than cargo owners. With the stronger bargaining power given by their P & I Clubs, shipowners could include in bills of lading exemption clauses which had the effect of relieving them from liability for any loss due to negligent navigation. Thus, cargo owners had to accept all the exemptions offered by the shipowners in the contract of carriage. This created an imbalance between the liabilities of shipowners and cargo owners.

### The Hague Rules

Since there was no uniformity of the bills of lading, there were attempts to draw up internationally recognised codes for the carriage of goods by sea. These were intended to standardise bills of lading and redress the balance of power between shipowners and cargo owners. In 1873 the International Law Association (ILA) was formed and it organised conferences to discuss a uniform law on bills of lading. In 1882 there was the Conference to Form a Model Bill of Lading, held at Liverpool in order to facilitate uniformity of bills of lading.

It was the first agreement to admit the concept of 'due diligence' which meant that shipowners had duties to make the ship seaworthy and properly equip it for the voyage. It also introduced the idea of unit limitation of shipowners' liability for loss of or damage to cargo. The maximum liability of shipowner per package was fixed at 100 pounds sterling. This model bill of lading modified shipowners' obligations by

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<sup>5</sup> J. C. Sweeney, 'UNCITRAL and the Hamburg Rules—The Risk Allocation Problem in Maritime Transport of Goods' (1991) 22 (3) *J. Mar. L. & Com.* 514.

providing a long list of specific causes of loss (drawn from shipowners' bill of lading) for which the shipowners would not be liable.<sup>6</sup>

In 1893 the United States' *Harter Act*<sup>7</sup> was the first legislation in any country to address the question of risk allocation for cargo damage. The legislation was intended to protect the interests of the United States as a cargo owning, rather than a shipowning, nation.<sup>8</sup> The *Harter Act* was regarded as legislation which attempted a compromise between the principles of strict liability under the general maritime law and the doctrine of freedom of contract, under which carriers were able to exonerate themselves from their liability by means of exemption provisions in their bills of lading.<sup>9</sup>

Under the *Harter Act*, if the shipowner used due diligence to make his ship seaworthy, he would not be liable for damage due to negligent navigation or management of the ship. This Act placed certain minimum but mandatory liabilities on the shipowners in order to offer the cargo owners at least some protection.<sup>10</sup>

It should be noted that some countries in the British Commonwealth of Nations copied much of the policy and language of the *Harter Act*, as in

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6       *Ibid.*

7       Ch. 105, 27 Stat. 445 (1893), codified at 46 U.S.C. App. §§ 190-96 (1988).

8       Sweeney, 515.

9       M. Sassoon and C. Cunningham, 'Unjustifiable Deviation and the Hamburg Rules' in S. Mankabady (ed.), *The Hamburg Rules on the Carriage of Goods by Sea* (1978)170.

10      Section 1 of the Act made it unlawful for a shipowner or his manager, agent or master to insert in any bill of lading a clause exempting him or them, from liability for loss or damage to cargo caused by negligence, fault or failure in proper loading, stowage, custody, care or proper delivery. Section 1 of the Act provides:

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

New Zealand's *Shipping and Seaman Act* 1903, Australia's *Sea Carriage of Goods Act* 1904 and Canada's *Water Carriage of Goods Act* 1910.

In 1921, a set of rules on bills of lading were formulated at the ILA conference in London. These rules were slightly amended and led to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels in August 1924 (known as the Hague Rules). It should be noted that the fundamental concept of the Hague Rules had previously been embodied in and was taken over from the United States *Harter Act*.<sup>11</sup> The Hague Rules entered into force in 1931. Today there are seventy-seven Contracting Parties, including a large number of developing countries.<sup>12</sup> In Australia, the Hague Rules were embodied in the *Sea-Carriage of Goods Act 1924*.<sup>13</sup>

### The Visby Protocol

The Hague Rules specify in detail the rights and liabilities of shippers and carriers. One of problems the Hague Rules set out to solve was the limit of liability per package or unit. It was fixed at 100 pounds sterling which is linked to the 'gold standard'. However, the gold standard was dropped some years after the adoption of the Hague Rules. This created many

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<sup>11</sup> See, for example, Diamon Q. C., in *Lloyd's Seminar on the Hague -Visby Rules* (1978) Diamon 2.; J. C. Sweeney, 'Happy Birthday, Harter: A Reappraisal of the Harter Act on its 100th Anniversary' (1993) 24 (1) *J. Mar. L. & Com.* 32.

<sup>12</sup> Algeria, Angola, Antigua & Barbuda, Argentina, Australia, Bahamas, Barbados, Belgium, Belize, Bolivia, Cape Verde, Cote d'Ivoire, Cuba, Cyprus, Denmark, Dominican Republic, Egypt, Ecuador, Fiji, Finland, France, Gambia, Germany, Ghana, Granada, Guinea-Bissau, Guyana, Hungary, Iran, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Kiribati, Kuwait, Lebanon, Madagascar, Malaysia, Mauritius, Monaco, Mozambique, Nauru, Netherlands, Nigeria, Norway, Papua New Guinea, Paraguay, Peru, Poland, Portugal, Romania, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, Spain, Sri Lanka, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sweden, Switzerland, Syrian Arab Republic, Tonga, Trinidad & Tobago, Turkey, Tuvalu, United Kingdom, United Republic of Tanzania, United States of America, Yugoslavia, and Zaire.

Source: *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention Report by the UNCTAD Secretariat*, U.N. Doc. Td/B/C.4/315 (1991) [hereinafter *Economic and Commercial Implications*].

<sup>13</sup> The Act was replaced by the *Carriage of Goods by Sea Act 1991*.

problems in the interpretation of carrier liability and it could be said that the Hague Rules failed to standardise the limits of liability. Moreover, the container revolution which is the world-wide use of large, standard-size containers, created more problems regarding the carriers' liability. The first attempt to update the Hague Rules were made when the Comité Maritime International (CMI) met in 1959 to consider reforms to the Convention.

In 1968, a diplomatic conference was held in Brussels, at which was adopted a Protocol to amend the International Convention for certain rules of law relating to Bills of Lading, known as the 'Visby Protocol'. This protocol increased the limitation of carrier liability for loss and damage to goods and solved the container problem by redefining the meaning of 'package or unit'. Limitation of carrier liability was increased to 10,000 gold francs per package or unit instead of 100 pounds sterling. The Visby Protocol also contains a so-called 'container clause' which enables the shipper to claim the allowed monetary compensation for each package inside a container or pallet if listed on the bill of lading.<sup>14</sup>

The Visby Protocol made a number of technical amendments to the Hague Rules, mainly intended to update the Rules rather than radically alter the basic precepts of liability. The Visby Protocol entered into force in 1977, and has currently nineteen Contracting Parties.<sup>15</sup> The Visby Protocol, together with the Hague Rules, created a liability system which is generally known as the 'Hague-Visby Rules'.

### **The 1979 Protocol to the Visby Protocol (SDR Protocol)**

In 1979 it became necessary to amend the Hague-Visby Rules, in particular the monetary limits of carriers' liability, because of world-wide inflation and the changing nature of the international monetary system. It was no longer possible to fix the monetary limits of carriers' liability by reference

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<sup>14</sup> The Visby Protocol, Art. 2.

<sup>15</sup> Australia, Belgium, Denmark, Ecuador, Egypt, Finland, France, Italy, Lebanon, Netherlands, Norway, Poland, Singapore, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tonga, and United Kingdom.

Source: *Economic and Commercial Implications*

to the price of gold because gold was no longer an stable international unit of value. Consequently, a new diplomatic conference was held in Brussels and adopted the 1979 Protocol to the Visby Protocol, also known as the 'SDR Protocol'. The SDR Protocol provides a new system of valuation of carrier liability for loss and damage of goods by using the terms of the Special Drawing Right (SDR), as defined by the International Monetary Fund, instead of the terms of the gold franc. It came into force in 1984 and now has twelve Contracting Parties.<sup>16</sup>

### The Hamburg Rules

Even though the Hague Rules were amended by the Visby Protocol, they were still considered by shippers to favour carriers. The reason is that the Visby Protocol updated the Hague Rules but did not alter the inherent balance of liability of them. The amended Hague Rules still have some provisions which give more benefit to the carriers than to the shippers; in particular, the provision which protects the carriers from their responsibility for loss of or damage to cargo arising or resulting from act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.<sup>17</sup> This provision is known as the 'nautical fault defence'.

In 1970 the United Nations Conference on Trade and Development (UNCTAD) Report on Bills of Lading<sup>18</sup> concluded that the Hague Rules were unduly favourable to shipowners because they contained exceptions or limitations which protected shipowners from liability. The Hague Rules also placed an undue economic burden on cargo owners involving a real income transfer from countries, particularly the developing countries which are essentially representative of cargo owners, to countries which are effectively representative of carriers.

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<sup>16</sup> Australia, Belgium, Denmark, Finland, France, Italy, Netherlands, Norway, Poland, Spain, Sweden, and United Kingdom.

Source: *Economic and Commercial Implications*

<sup>17</sup> The Hague Rules, Art. 4 (2) (a).

<sup>18</sup> UNCTAD Report. Doc. No. TD/B/C.4/ISL/6 of 14 Dec. 1970.

The UNCTAD Report made the following points:

- (1) The Hague Rules were unduly favourable to shipowners in that they contained exceptions or limitations which protected shipowners from liability for loss of or damage to cargo in circumstances where such protection should not be expected to be given.
- (2) The Hague Rules were uncertain or ambiguous in their application and that they needed revision to achieve greater clarity and comprehensiveness.
- (3) UNCTAD observed that the Hague Rules were not what was called cost-effective, since they had given rise to overlapping insurance which was said to be wasteful and to involve unnecessary economic cost. The Report suggested the unnecessary economic cost involved in overlapping insurance could be reduced or removed by shifting liability from the cargo to the ship and clarifying the terms of the contract of carriage.
- (4) The Hague Rules as noted already, were regarded as placing an undue economic burden on cargo owners involving a real income transfer from countries, particularly the developing ones (which are essentially cargo owners) to countries which are effectively carriers.<sup>19</sup>

As a result, there have been attempts by many developing countries to update the Hague Rules by creating a fairer balance between carriers (countries with significant marine trade) and shippers (cargo countries) in the allocation of risk, right and obligations with regard to liability. Thus, a draft convention relating to the rights and liabilities of shippers and carriers was prepared by the United Nations Commission on International Trade Law (UNCITRAL), and this was adopted at United Nations Conference on the Carriage of Goods by Sea in Hamburg in 1978 with the participation of 78 States, including many developing countries. The United Nations Convention on the Carriage of Goods by Sea 1978, known as 'the Hamburg Rules', in contrast to the Hague Rules, is considered to be more favourable to shippers than carriers. This is because the Hamburg Rules increase the limit of liability, address the question of the unit limitation value of package stowed in containers, and develop the concept

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<sup>19</sup> *Ibid.*

of arbitration. The most important improvement is that the Rules change the scheme of carrier liability by eliminating the nautical fault defence and other exemptions in the Hague Rules and replace them with new provisions.

The new Convention presumes that the carrier is liable for loss or damage and delay in delivery if the goods were in his charge, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.<sup>20</sup> Moreover, the Hamburg Rules increase the monetary limit of carrier liability and also extend the period of carrier responsibility. Under the provision of Article 30, the Hamburg Rules will enter into force one year after twenty states accede or ratify them. Twenty states have already ratified this Convention, and its entry into force commenced on November 1, 1992.<sup>21</sup>

### **A Comparison of The Hague and Hamburg Rules**

The carriers' liability regime of the Hamburg Rules differs in a number of important aspects from the Hague Rules. The main differences between these two conventions are the scope of application of the convention, the period of carriers' responsibility, the general rules of carriers' liability, and the monetary limit of carriers' liability. There is, however, some continuity between these two conventions. Therefore, it is essential to examine these provisions in order to comprehend major differences of these Rules and to evaluate their effect on countries' liability regime. This comparison leads to an understanding of a country's position in

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<sup>20</sup> The Hamburg Rules, Art. 5 (1).

<sup>21</sup> The following states have ratified as of October 7, 1991: Barbados, Burkina Faso (formerly Upper Volta), Chile, Egypt, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Tunisia, Uganda, U. Rep. Tanzania, and Zambia. In accordance with Article 30 (1), the treaty entered into force on November 1, 1992.

international liability regime which is essential to the later analysis on comparative aspects of marine cargo liability regimes.<sup>22</sup>

## Scope of Application

It has already been noted that the Hamburg Rules have a broader scope of application than that of the Hague or Hague-Visby Rules, particularly in the case of contracts of carriage which are not evidenced by a bill of lading. The scope of application of the Hague Rules is limited by two factors. First, by the bill of lading and secondly, by the kind of goods carried.

### The Bill of Lading

First, the provisions of the Hague Rules only apply where the bill of lading relating to the carriage of goods between ports in different states is issued in a Contracting State, or the carriage is from a port in a Contracting State; if not the rules are not compulsory.<sup>23</sup> The Hamburg Rules, in contrast, are applicable to all contracts of carriage by sea between two different states (whether a bill of lading is issued or not) if the port of loading or discharging is in a Contracting State, if the bills of lading or other document evidencing the contract is issued in a Contracting State or if the bill of lading or other document evidencing the contract provides for the Hamburg Rules to apply. Article 2 of the Hamburg Rules provides that:

1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:
  - (a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or
  - (b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or
  - (c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or
  - (d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or

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<sup>22</sup> See Chapter VII.

<sup>23</sup> The Hague Rules, Art. 1 (b) and Art.10.

- (e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

It could be emphasised that the development of electronic data processing<sup>24</sup> makes the conventional Bills of Lading more and more superfluous.<sup>25</sup> This is because modern transportation requires multimodal carriage with regard to transactions by computer-generated documents, such as waybills, and without bills of lading. Therefore, the problem is that the Hague Rules apply only to contracts of carriage covered by bills of lading or any similar document of title. This stumbling block of the Hague Rules is overcome in the Hamburg Rules which apply to all contracts of carriage by sea without regard to whether a document of title must be issued.

### Live Animals and Deck Cargo

Secondly, the scope of application of the Hague Rules is also limited by the definition of 'goods' which excludes live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.<sup>26</sup> By contrast, the Hamburg Rules also specifically include live animals in the meaning of 'goods' in Article 1 (5) and provide, in Article 9, that the carrier is entitled to carry goods on deck only if such carriage is in accordance with an agreement with the shipper.

As a result, under the Hague Rules shipowners are normally not liable for cargo carried on deck under a bill of lading which clearly states that cargo is so carried because the Rules do not apply to deck cargo. However, this does not mean that the carrier is necessarily immune from liability. The carrier's liability in such a case is governed by the terms of the bill of lading, which may provide terms for deck cargo. Under the Hamburg

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<sup>24</sup> See Chapter VI.

<sup>25</sup> R. Herber, 'United Nations Convention of the Carriage of Goods by Sea, (1978) the Hamburg Rules' in *Asian Pacific Regional Trade Law Seminar*, (Canberra 1984) 136.

<sup>26</sup> The Hague Rules, Art.1 (c).

Rules this will be changed, because the carrier and the shipper can make an agreement to carry goods on deck and the carrier must insert such agreement in the bill of lading or other document evidencing the contract of carriage by sea. When the goods have been carried on deck, the carrier is liable for loss or damage to the goods, as well as delay in delivery, resulting solely from the carriage on deck. The extent of the carrier's liability is to be determined in accordance with the provision of Article 6 or Article 8 of the Hamburg Rules. This means that the monetary limits of liability also apply to each package inside the container when it is carried on deck.

Even though live animals are included in the new convention, the carrier's liability is still limited. Article 5 (5) of the Hamburg Rules provides that the carrier is not liable for loss, damage or delay in delivery from any special risks inherent in that kind of carriage if the carrier proves that he has complied with any special instructions given to him by the shipper.

### **Period of Responsibility**

Under the Hague-Visby Rules, the carrier's period of responsibility is effective only when cargo has been loaded onto the ship and this responsibility remains effective until discharged.<sup>27</sup> Traditionally, buyers and sellers of goods requiring sea transport had focused their interest at the port of loading or discharge of the goods. They developed a trading system which located the division of responsibility for the goods and their transport at the 'ship's rail', the so-called 'critical point'.<sup>28</sup> This was because the shippers would normally deliver their cargo on the dock, underneath the ship's hook. They had to do so because freight payment covered only the movement of goods from port to port. Therefore, the movement of cargo was known as 'tackle-to-tackle' or 'hook-to-hook'. The carriers had nothing to do with the cargo before it was loaded on board the ship or after

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<sup>27</sup> *Id.* Art. 1 (e).

<sup>28</sup> *Economic and Commercial Implications*, 17.

it had been discharged from it. This meant that the carriers had no responsibility for loss of or damage to cargo during that time.

This concept of the period of responsibility caused problems in sea carriage because in some contracts of carriage the carriers may have been involved in the transit stage before loading and later discharge. Moreover, in practice shippers usually deliver the goods to the carrier's warehouse before the ship is ready to load, and the carriers often have custody of the goods for a period of time between unloading and delivery to the consignees. In addition, the loss of or damage to goods cannot be discovered before a container is opened and it is difficult to determine when the damage occurred and who would take responsibility for that damage.

By contrast, under the Hamburg Rules the period of responsibility is extended to cover the time the cargo is on the wharf in addition to the time the cargo is on the ship. Article 4 provides that the carrier has responsibility during the period in which he is in charge of the goods at the port of loading, during the carriage, and at the port of discharge. Underlying this change is the introduction of 'door-to-door' or 'warehouse-to-warehouse' transport.

This kind of transport can operate regardless of whether the goods have been containerised or kept in another transport unit such as a road vehicle. The shipper usually no longer delivers his goods under the tackle of the carrier's ship, but to his own warehouse or the carrier's warehouse. This means that the carrier has responsibility from the time he has taken over the goods from the shipper or a person acting on his behalf, until the time he has delivered the goods by handing over the goods to the consignee.

## **General Rules of Carriers' Liability**

Under the Hague Rules, carriers' liability is based on common law principles of fault.<sup>29</sup> The carrier is bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy and to properly man, equip and supply the ship for the voyage. The carrier, however, has no liability for loss or damage arising or resulting from unseaworthiness during the voyage. As provided in Article 4 (1) of the Hague Rules, neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy.

Furthermore, Article 4 (2) provides other exemptions which discharge the carrier from responsibility, such as fire, perils, dangers and accidents of the sea or navigable waters, acts of God, and acts of war. The most important exemption is provided in Article 4 (2) (a), that is, that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from act, neglect, default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship. This provision is known as the 'nautical fault defence' which protects the carrier from responsibility.

Carriers' liability under the Hamburg Rules is based on the civil law concept of presumed fault with a reversed burden of proof.<sup>30</sup> The Hamburg Rules abolish the nautical fault defence and other exemptions in the Hague Rules. The general rules of carrier liability are provided in Article 5 (1) of the Hamburg Rules, so that the carrier is liable for loss resulting from loss of or damage to the goods as well as delay in delivery, unless he proves that he took all measures that could reasonably be required to avoid the occurrence which caused the loss, damage or delay. This means that the carrier has no immunity when the ship is mismanaged by his crew.

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<sup>29</sup> B. Makins, *Sea Carriage of Goods Liability : Which Route for Australia? The case for the Hague Visby Rules and the SDR Protocol*, 14th International Trade Law Conference (Canberra 1987) 11.

<sup>30</sup> *Id.* at 12.

## Nautical Fault Defence

The nautical fault defence has its origin in the concept of the common maritime adventure.<sup>31</sup> The common maritime adventure considers that merchant and shipowner share the perils of the sea carriage and that there are inherent risks that cannot be prevented by the due diligence of the shipowner. Thus, the shipowner has the responsibility to make the ship seaworthy, and to properly man and equip it at the beginning of the voyage. Once the ship puts to sea it is accepted by both merchant and shipowner that they have to suffer together if the ship is lost due to the perils and dangers of the sea, because no more can be done to protect the adventure. This concept underlies the nautical fault defence.

Another principle of law that underlies the nautical fault defence is that called 'vicarious liability', which makes one person liable for the wrongdoings of another person who acts under his control. The nautical fault defence can be justified on the basis that the shipowner should not be held vicariously liable for the nautical fault of his crew over whom he has no control after the ship has commenced the voyage.<sup>32</sup>

The nautical fault defence, also known as 'negligent navigation' or 'navigational fault exception', arose in the period 1882-1889 from the Protection and Indemnity Clubs (P & I Clubs which are non-profit shipping organisations). This insisted that a clause relieving the shipowner from liability for any loss due to negligent navigation by his employees be inserted into the bills of lading issued by all shipowners whose vessels were entered in the same club.

The nautical fault defence was adopted in the Hague Rules. Article 4 (2) (a) provides that neither the carrier nor the ship shall be responsible for loss or damage arising from act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship. This is the main provision that protects the

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<sup>31</sup> Makins, 13.

<sup>32</sup> *Ibid.*

carrier from liability for his responsibility in navigation or management of the ship.

There is no doubt that the Hamburg Rules alter the scheme of carrier's liability, because the Hamburg Rules eliminate the nautical fault defence and other exemptions of carrier responsibility under Article 4 of the Hague Rules. The Hamburg Rules move to a regime of presumed carrier fault or negligence. Article 5 (1) of the Hamburg Rules provide that the carrier is liable for loss resulting from loss of or damage to the goods or delay in delivery in respect of the goods if the occurrence causing the loss, damage or delay in delivery took place while the goods were in the care of the carrier. This will be the case unless the carrier proves that he, his servants and agents took all measures which they could reasonably be required to take in order to avoid the occurrence which caused the loss, damage or delay in delivery and its consequences.

It is necessary to clarify Article 5 (1) by considering the 'Common Understanding' annexed to the Hamburg Convention which provides that:

It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.

From Article 5 (1) and the 'Common Understanding' it can be seen that not only liability is put on the carrier but also the burden of proof.

### **Monetary Limit of Carriers' Liability**

The Hague Rules provide the monetary limit of carriers' liability for loss of or damage to cargo by using 'Gold Value'. Article 4 (5) provide that the carriers' liability is limited to 100 pounds sterling per package or unit or the equivalent of that sum in other currency, and Article 9 provides that the monetary unit mentioned in the Hague Rules is to be taken to be gold value. The gold pound sterling was adopted as a convenient medium for

stabilising any unit of currency. However, in 1931 the United Kingdom went off the gold standard and sterling became a fluctuating currency.<sup>33</sup>

The Hague's monetary limit failed to standardise the limit of liability because these provisions could not specify the weight and fineness of gold represented by the pound sterling. Therefore, it was questionable whether the gold value of sterling meant the gold value in 1924 or the value at some later date. Moreover, the contracting States had the right to convert the sterling amount without indicating at which time the conversion must be made. As a result, each contracting state converted the equivalent of 100 pounds sterling in its own way. This had a great effect on the carriers' liability because limitation of liability differed from one country to another.<sup>34</sup> The following table shows the differences in limitation amounts in some countries in 1972.

Limitation Amounts 'Per Package or Unit' In Certain Countries in 1972<sup>35</sup>

Country	Limitation Amount	Official Equivalent in Pound Sterling	Rounded Equivalent in U.S.\$
Australia	\$ 100 Australian	47	122
Belgium	17,500 Belgian francs	150	370
Canada	\$ 500 Canadian	192	500
Denmark	1,800 Danish kroner	99	257
Finland	600 new Finnish marks	56	146
France	2,000 francs	150	390

<sup>33</sup> W. Tetley, 'An Update on the Per Package Limitation and National Intention Regarding Future Carriage of Goods by Sea Legislation', (1983) 14 *J. Mar. L. & Com.*, 334-344.

<sup>34</sup> Mankabady, 'Comments on the Hamburg Rules', *op. cit.* 112.

<sup>35</sup> Source :*The Hamburg Rules on the Carriage of Goods by Sea* , Edited by Mankabady, S., London, 1978 p.309 (Appendix IV, Reproduced from the report of UNCITRAL A/CN.9/WG. III/WP 10 (vol. 1), of 19 December 1972.)

Country	Limitation Amount	Official Equivalent in Pound Sterling	Rounded Equivalent in U.S.\$
Federal Republic of Germany	1,250 DM	149	388
Greece	8,000 drachmas	102	264
Ireland	100 pound sterling	101	261
Italy	200,000 lire	131	340
Japan	100,000 yen	123	320
Netherlands	1,250 florins	148	385
Norway	1,800 Nr. kroner	104	270
Portugal	12,500 escudos	138	359
Spain	5,000 pesetas	31	80
Sweden	1,800 Swedish kroner	145	378
Switzerland	2,000 Swiss francs	204	528
United Kingdom	100 pounds sterling	100	260
United States	\$ 500	192	500
USSR	250 Roubles	115	300

In *Brown Boveri (Australia) Pty. Ltd. v Baltic Shipping Co.*<sup>36</sup> the New South Wales Supreme Court held that when read together Article 9 and Article 4 (5) of the Hague Rules meant that the limitation amount should be the current market value of the quality of gold which was the equivalent of 100 pounds sterling in 1924. In *William Holymen & Son Pty. Ltd. v Foy & Gibson Pty. Ltd.*<sup>37</sup> the High Court of Australia struck down a provision in the bill of lading which deemed the value of each unit shipped under the bill of lading to be a fixed sum less than 100 pounds sterling under Article 4 (5) of the Hague Rules. The High Court held that the bill of lading was inconsistent with Article 4 (5) and was therefore void under Article 3 (8).

In 1968, the Visby Protocol attempted to solve the monetary limitation problems by replacing the pound sterling with an artificial currency, the 'Poincare Franc', based on gold. The liability amount in the Visby Rules

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<sup>36</sup> Unreported, Supreme Court of New South Wales (Admiralty Division) (1986) It should be noted that the actual wording of Article IX has given rise to considerable debate due to the speculative nature of the meaning of 'gold value' and the relative value of 100 pounds sterling particularly its equivalent value in other currencies. See T.M.C. Asser 'Golden Limitation of Liability' (1975) 5 *J. Mar. L. & Com.* 645.

<sup>37</sup> (1945) 73 C.L.R. 622.

was fixed at 10,000 francs per package or unit or 30 francs per kilogram of gross weight of goods lost or damaged, whichever was the higher. It defined the new currency together with the time at which the conversion must be made in Article 4 (5 d):

A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900'. The date of conversion of the sum awarded into national currencies shall be governed by the law of the Court seized of the case.

Unfortunately, the new monetary limitation under the Visby Rules<sup>38</sup> still did not solve the problems. The main reasons were world-wide inflation and the difficulty of converting an amount expressed in gold into another currency. This difficulty occurred because the official value of gold differed from its free market value. This led to criticisms as to the suitability of gold as a basis for fixing the amount of the carrier's liability.

Consequently, a new international monetary system was introduced in the Hamburg Rules of 1978. In the new convention the carriers' liability is limited by the term 'unit of account' which is one 'Special Drawing Right' (SDR) as defined by the International Monetary Fund (IMF)<sup>39</sup> instead of the gold franc. The limitation amounts in the Hamburg Rules is limited to an amount equivalent to 835 SDR per package or other shipping unit or 2.5 SDR per kilogram of gross weight, whichever is the higher. The conversion of limited amounts into the national currency of a State is made according to the value of such currency at the date of judgement or the date agreed upon by the parties.<sup>40</sup>

The introduction of the new monetary system was mandated by the sterling changes in the nature of the value of gold since 1971, whereby the Poincare franc was no longer a guarantee against wild swings of value. The expectation of the IMF was that adoption of the SDR in international convention will reduce some of the worst effects of single nation inflation

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<sup>38</sup> Article 2 of the Visby Protocol

<sup>39</sup> See L. Ward, 'The SDR in Transport Liability Conventions: Some Clarification', 13 J. Mar. L. & Com., 1 (1981).

<sup>40</sup> The Hamburg Rules, Article 6 and Article 26.

caused by unusual economic conditions, although such a scheme could not correct all the problems of world-wide persistent inflation.<sup>41</sup>

Since it was necessary to amend the monetary limitation of carrier's liability and the Hamburg Rules still had not entered into force at that time, the SDR Protocol was adopted in 1979. The SDR Protocol amended the monetary limitation in the Visby Protocol by using the same monetary system as is provided in the Hamburg Rules. The SDR Protocol limits the carrier's liability to 666.67 SDR per unit or package or 2 SDR per kilogramme of gross weight, which is lower than the limitation in the Hamburg Rules.

It should be noted that the value of the SDR has declined since its adoption because of world-wide inflation. For example, at the end of 1987 the 667 SDR of the SDR Protocol was only worth 447 SDR measured in 1979 SDR, or 67 per cent of the original value.<sup>42</sup> For Australia, since the *Carriage of Goods by Sea Act 1991* (Cth) incorporated the Hague Rules as amended by the Visby and the SDR Protocol, the monetary limitation of carrier's liability has been under the SDR system. The value of the Australian dollar was \$1 = 0.5555 SDR in 1987, \$1 = 0.5897 SDR in April 1990, \$1 = 0.4929 SDR in September 1992, and \$1 = 0.4550 SDR in September 1993.<sup>43</sup>

### **Loss of Right to Limit Responsibility**

Under both the Hague-Visby Rules and the Hamburg Rules the carrier is not entitled to the benefit of the limitation of liability if loss, damage or delay is caused intentionally or recklessly, and with knowledge that such loss, damage or delay would probably result. Under the Hamburg Rules this provision applies to servants or agents of carriers as well.<sup>44</sup>

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<sup>41</sup> J. C. Sweeney, 'Article 6 of the Hamburg Rules' in S. Mankabady (ed.), *The Hamburg Rules on the Carriage of Goods by Sea*, (1978) 153; J. O. Honnold, 'Ocean Carriers and Cargo; Clarity and Fairness--Hague or Hamburg?', (1993) 24 *J. Mar. L. & Com.* 92.

<sup>42</sup> UNCTAD, *Economic and Commercial Implications* p.14.

<sup>43</sup> Source: Reserve Bank of Australia.

<sup>44</sup> The Hague Rules, Article 4(5 e), The Hamburg Rules, Article 8

## **Notice of Loss or Damage and Notice of Delay**

The Hague-Visby Rules provide that notice of loss or damage should be made before or at the time of collecting goods and within three days if not apparent but there is no provision about notice of delay.<sup>45</sup> Under the Hamburg Rules the duration of time is extended. Notice of loss or delay or damage can be made within one working day after delivery of goods or within fifteen days if this is not apparent. Notice of delay can be made within sixty days.<sup>46</sup>

## **Limitation of Actions**

Under the Hague-Visby Rules the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of goods or the date when the goods should have been delivered.<sup>47</sup> However, parties may extend the period by agreement. Under the Hamburg Rules the limitation of actions is extended to two years and may be extended by the carrier in favour of the claimant.<sup>48</sup>

## **Dangerous Goods**

The Hague-Visby Rules and the Hamburg Rules both have the provision that when dangerous goods are accepted with or without the carrier's knowledge, and become a danger to life or property, the carrier can destroy those goods without liability to the owner. The Hamburg Rules, however, include a liability on the shipper to declare and to take precautions for dangerous goods. The shipper also has a liability to the carrier for loss resulting from the shipment of such goods.<sup>49</sup>

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<sup>45</sup> The Hague Rules, Article 3(6)

<sup>46</sup> The Hamburg Rules, Article 19

<sup>47</sup> The Hague Rules, Article 3(6)

<sup>48</sup> The Hamburg Rules, Article 20

<sup>49</sup> The Hague Rules, Article 4(6), The Hamburg Rules, Article 13.

## **Arbitration and Jurisdiction**

The Hague-Visby Rules do not define the place where suit must be brought. It is up to parties of the contract of carriage to nominate a place or places where any dispute over cargo loss or damage may be settled in the bill of lading. Therefore, it is usual for a bill of lading issued under a charter party to include an arbitration clause. Under the Hamburg Rules parties may provide by agreement in writing that any dispute shall be referred to arbitration. Judicial proceedings may be instituted at the plaintiff's option at the defendant's principal place of business, the place of contract, or the port of loading or discharge or other designated place.<sup>50</sup>

## **Non-Contractual Claims**

The Hague-Visby Rules and the Hamburg Rules provide the same provision that defences and limits of the carrier's liability apply to all forms of civil claims against carriers whether the action is founded in contract, in tort or otherwise.<sup>51</sup>

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<sup>50</sup> The Hamburg Rules, Article 22.

<sup>51</sup> The Hague Rules, Article 4 bis, The Hamburg Rules, Article 7.

## **Part II**

### **The Economic and Commercial Implication of the Entry into Force of the Hamburg Rules**

#### **Introduction**

From the foregoing it can be seen that the Hamburg Rules alter the liability of the ocean carriers. This change, however, did not have a great effect on marine cargo liability regimes in certain countries or international shipping trade over a short period of time because at present there are only twenty Contracting Parties,<sup>52</sup> none of them is a major shipping nation, and nine of them are in fact landlocked countries.<sup>53</sup> It is most likely that the Hamburg Rules will not work in practice without acceptance by the major shipping nations.

However, evaluation of the Hamburg Rules should be based on a consideration of whether, the extent to which, their provisions create advantages or disadvantages to both shipowners and cargo owners. If a number of major shipping nations adopt the Hamburg rules, the major changes in the carrier's liability system by the new rules will have an effect on the overall marine cargo liability regimes. The major areas that will be examined in this third part are the basic liability of carrier and marine insurance.

#### **Basic Liability of Carrier**

Compared with the Hague Rules, the liability regime of the Hamburg Rules will provide more advantages to shippers and will render a better balance of power between carriers and shippers. According to the Hamburg Rules, shippers will be better protected because the carriers will no longer have many exemptions allowed under the Hague Rules. In particular, by

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<sup>52</sup> See note 21 above.

<sup>53</sup> Austria, Botswana, Burkina Faso, Czech Republic, Hungary, Lesotho, Malawi, Uganda, and Zambia.

the elimination of the nautical fault defence the carrier cannot escape from his responsibility for loss of or damage to cargo which occurs in the navigation or management of the ship. However, this higher liability is not strict liability; the carrier is not liable for all cargo loss or damage without limitation. The carrier can escape from liability if it can prove that it took all measures that could reasonably be required to avoid the occurrence and its consequences.

The higher monetary limits are to the advantage of shippers and, by contrast, to the disadvantage of carriers. It should be noted, however, that the monetary limits today are lower than those agreed to in 1978 because of world-wide inflation.

The broader scope of application and the extension of the carrier's period of responsibility in the Hamburg Rules will be advantageous in that it will support the need of modern transportation, in particular, the carriage of goods without a bill of lading. Moreover, it should cover the carriage of live animals and deck cargo. The extension of the period from 'tackle-to-tackle' to 'warehouse-to-warehouse' may solve problems of responsibility during transaction of cargo which arises under the Hague Rules. Therefore, it could be considered that the Hamburg Rules will fill the gaps in the present international legal system under the Hague Rules.

However, there are arguments against the Hamburg Rules. Opponents of the Hamburg Rules argue that the philosophy underlying the allocation of risk in the Hamburg Rules misunderstands the ancient concept of the common maritime adventure and ignores the lessons of history. These opponents argue that because the nautical fault defence was tested with some success in the Liverpool (Model) Bill of Lading of 1882, was the grand compromise that enabled the United States *Harter Act* 1893, is the foundation of the Hague Rules 1924, and was also carefully preserved in the Hague-Visby Rules, the nautical fault defence is a proven, efficient and cost effective means of allocating risk in the modern maritime adventure.

It enables the many cargo owners to spread the risk over many insurers and over a wide geographical area.<sup>54</sup>

It is also argued that the elimination of the nautical fault defence will be detrimental to carriage of goods by sea law. One of the main reasons is that many settled questions under the Hague Rules will be required to be relitigated, as the nautical fault defence and other defences have been interpreted in particular ways by courts throughout the world for more than half a century. This will cause confusion and expense. Opponents of the Hamburg Rules also claim that because of the slight change in the balance of liability, the number of claims against carriers will increase.<sup>55</sup>

Proponents of the Hamburg Rules consider that the Hamburg Rules more equitably distribute risk between carriers and shippers, particularly with respect to abolishing the nautical fault defence. One commentator observes as follows:

Freeing ocean carriers from liability for their fault by contract in principle permits an ocean carrier to escape liability for his own negligence or that of his servants. No carrier in any other modern mode of carriage (by road, rail or air) is given this right, nor is any other profession given such relief for the fault of its members (lawyers, doctors, taxi owners, taxi drivers, or even average adjusters).

The adoption of Art. 5 (1) of the Hamburg Rules would put ocean carriers in step with the rest of the world's carriers and the law of responsibility in general.<sup>56</sup>

The entry into force of the Hamburg Rules will bring legal advantages because they will assimilate the rules on maritime transport to rules on other modes of transport. Liability is based on presumed fault under the Hamburg Rules rather than the nautical defence. This will be a benefit for combined transport because it is important that rules, in particular on the

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<sup>54</sup> Makins, 12.

<sup>55</sup> UNCTAD, *Economic and Commercial Implications*, 37.; Moor, 'The Hamburg Rules', (1978) 10 *J. Mar. L. & Com.* 11, ; D. A. Werth., 'The Hamburg Rules-A look at U.S. Options', (1990) 22 *J. Mar. L. & Com.* 73.

<sup>56</sup> W. Tetley, 'Cargo Owners' Obligations in General Average' (1988) 19 *J. Mar. L. & Com.* 105.

carrier's liability, are as similar as possible.<sup>57</sup> Proponents of the Hamburg Rules also claim that the elimination of the nautical fault defence is no longer unreasonable, because nowadays safety in navigation has been improved by technological equipment, such as, radar, satellite communications, telephone, telex, fax, and electronic mail. Shipowners, therefore, can be in daily contact with their vessels and masters can take important decisions by consulting with their head office. For this reason shipowners should be held vicariously liable for any error in navigation of their crew. Furthermore, the elimination of the nautical fault defence and the various exemptions will not in reality change carriers' liability much, because over the coming years the volume of claims will increase whether or not the Hamburg Rules are adopted.<sup>58</sup>

### **Marine Insurance**

Liability insurance and cargo insurance are important factors in the carriage of goods by sea. Both shipowners and cargo owners usually insure their risks in the sea carriage adventure to protect themselves. Marine insurance costs are one of the major expenses in the budget of the shipowners and cargo owners, and, therefore, are major contributors to the total transport cost. The changing of the rules governing carriers' liability by the Hamburg Rules, in particular by the elimination of the negligent navigation and management defences, will affect marine insurance to some extent. The most important question is whether the changing of liability regimes will increase or decrease total insurance costs and how much any change will influence the total transport cost.<sup>59</sup>

There have been arguments on the insurance issue since the drafting of the convention in the 1970s. Opponents of the Hamburg Rules claim that

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<sup>57</sup> Herber, 157.

<sup>58</sup> UNCTAD, *Economic and Commercial Implications*, 40.

<sup>59</sup> See generally: M. F. Sturley, 'Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence' (1993). 24 *J. Mar. L. & Com.* 119; C. W. H. Goldie, 'Effect of the Hamburg Rules on Shipowners' Liability Insurance' (1993) 24 *J. Mar. L. & Com.* 111; Selvig, 'The Hamburg Rules, The Hague Rules and Maritime Insurance Practice' (1981) 12 *J. Mar. L. & Com.* 299-311.

overall insurance costs are lower under the Hague Rules or the Hague-Visby Rules. The liability of shipowners will be increased substantially when the Hamburg Rules come into operation and this increased liability will lead to greater insurance costs for shipowners.<sup>60</sup> As a result of the abolition of the nautical fault defence, if there is liability on the carrier in cases of fault of the master or crew in management or navigation of the ship, there will be more cases where a claim against the carrier or his liability insurer is justified and successful. Therefore, the cost of carriage caused by additional liability insurance premiums will increase.

Proponents of the Hamburg Rules argue that shifting more of the risk of loss to carriers will not cause an overall increase in insurance costs, since carriers are self-insured through their Protection and Indemnity Clubs (P & I Clubs). These are non-profit organisations, and P & I insurance is less expensive than cargo insurance. Moreover, the greater liability on carriers would lead to a higher standard of care, which would decrease the incidence of cargo damage and, therefore, reduce overall insurance costs.<sup>61</sup> Some argue that the Hamburg Rules are clearer and more predictable than the Hague Rules or Hague-Visby Rules, and that this predictability will reduce litigation and the expense of claims settlement, which in turn will reduce overall insurance costs.<sup>62</sup> The shipowners and their P & I Clubs will not face much greater expense unless claims covering the increased liability are successful.<sup>63</sup>

The coming into force of the Hamburg Rules also means that cargo insurance companies will have greater access to legal recourse against carriers.<sup>64</sup> This is because in practice when cargo insurers indemnify a shipper or consigner for all damage incurred irrespective of the liability of the carrier, then cargo insurers may take recourse against the carriers

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60 Makins, 17.

61 See UNCTAD, *Economic and Commercial Implications*; Selvig, 311.

62 UNCTAD, *Bills of Lading--Comments on a Draft Convention on the Carriage of Goods by Sea*, reported by the UNCITRAL Working Group on International Legislation on shipping, U.N. doc. TD/B/C.4/ISL/19, para. 15 (1975).

63 D. A. Werth, 'The Hamburg Rules-A look at U.S. Options', (1990) 22 *J. Mar. L. & Com.* 73.

64 UNCTAD, *Economic and Commercial Implications*, 41.

where they are liable by using their right of subrogation. Therefore, there may be a reduction in the costs of cargo insurance because the cargo insurer gets a greater chance to recover costs from the carrier. However, cargo interests and insurers believe that there will not be a reduction in cargo insurance premiums, because legal actions are difficult and costly.<sup>65</sup>

The carriers normally insure their liability with their P & I Club, and the shippers insure their cargo with the cargo insurers, to make sure that they will be indemnified and recover for losses or damage to their cargo if the carriers have no liability. This system is often referred to as 'overlapping insurance' or 'double insurance'. Under the Hamburg Rules, it is hoped that shifting the burden of insurance to the carriers will mean the shippers no longer need to buy cargo insurance. This will eliminate the wasteful double insurance expense. However, it is obvious that most of the shippers would still prefer to purchase cargo insurance because the Hamburg Rules do not make the shipowners liable for all cargo loss or damage without any limitation.

The UNCTAD report on the economic and commercial implications of the entry into force of the Hamburg Rules<sup>66</sup> reached the conclusion that the Hamburg Rules will not diminish the need for cargo insurance, and may reduce cargo insurance expenses through the greater possibility that cargo insurers will succeed in claims against the carrier or carrier's insurer. It may also result in a more cost-effective insurance system, because the slight increase in the liability of shipowners will induce them to take greater care with cargo in order to avoid increased liability premiums.

An analysis of the insurance argument by Sturley<sup>67</sup> points out that there is no empirical evidence in the debates concerning increases or decreases in marine insurance costs. Opponents and supporters of the Hamburg Rules have argued about what will happen in marine insurance if there are certain changes in the legal rules governing this area and that the

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<sup>65</sup> Herber,160.

<sup>66</sup> UNCTAD, *Economic and Commercial Implications*, 45.

<sup>67</sup> Sturley, *Changing Liability Rules and Marine Insurance*, supra note 53.

argument needs to be supported by empirical evidence. The absence of empirical evidence makes the argument unanswerable. It is suggested that the lack of such evidence occurs because insurance companies are not willing to provide the statistics that they view as confidential proprietary information, or because they do not gather information in any useable form.<sup>68</sup> Sturley concludes that there is a possibility that the insurance argument cannot be resolved because of the lack of empirical evidence, and that it may be time to abandon the insurance argument and move on to other approaches for evaluating proposed changes in the liability regime.<sup>69</sup>

### The Need for Marine Cargo Liability Regime Uniformity

The United Nations and UNCITRAL have made the best effort to promote the Hamburg Rules, in order to create unification of laws governing marine cargo liability regimes and reduce or remove legal obstacles to the flow of international trade.<sup>70</sup> The Hamburg Rules, provided that they receive international acceptance, would significantly contribute to international economic cooperation among trading nations on the basis of common interest. The Rules could lead to the elimination of discrimination in international trade by offering a fairer balance in terms of carriage liabilities between major shipping countries and cargo owning countries, the latter often being developing countries. Moreover, the Rules could effectively reduce a wide gap between countries' marine cargo liability regimes which now considered to be in a state of disuniformity. The possibilities regarding a country's marine cargo liability regime include:

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<sup>68</sup> J. C. Sweeny, 'The UNCITRAL Draft Convention on Carriage of Goods by Sea' (1976) 7 *J. Mar. L. & Com.* 108.

<sup>69</sup> Sturley, 149.

<sup>70</sup> See General Assembly resolution 48/33 of 9 December 1993. Official Records of the United Nation Convention of the Carriage of Goods by Sea, Hamburg, 6-31 March 1978 (United Nations publication, Sales No. E.80.VIII.1), document A/CONF.89/13, Annex I.

1. No convention is applicable, and there is no known maritime code for the carriage of goods.
2. No convention is applicable, but an older maritime code applies (particularly for former colonies).
3. No convention is applicable, but the Hague Rules or the Hague-Visby Rules were adopted in the Commercial Code.
4. No convention is applicable, but a custom crafted maritime code, using one or more conventions, applies.
5. The Hague Rules were ratified or acceded to.
6. The Hague Rules apply, but have been supplemented or modified.
7. The Hague-Visby Rules were ratified or acceded to (with or without the SDR Protocol).
8. The Hague-Visby Rules apply, but have been supplemented or modified.
9. The Hamburg Rules were ratified or acceded to, but have not been enacted into domestic law, or a previous convention(s) has not been denounced.
10. The Hamburg Rules apply unconditionally.<sup>71</sup>

However, the fact is that, as of July 1996, the Hamburg Rules had only 25 adherents. Moreover, the number is somewhat misleading because it does not include any of the major shipping nations, and nine of the countries are landlocked and have no port access.<sup>72</sup> Also, many are not significant actors in world trade. In fact, less than five percent of world trade would fall under the Hamburg Rules at this time. By contrast, the Hague Rules and the Hague-Visby Rules are in effect in 102 countries or territories encompassing over seventy five percent of world trade.

The dominance of the Hague Rules and the Hague-Visby Rules, however, is more apparent than real, as more and more states have undertaken to modify or modernize their version of the rules. For example, some countries including the People's Republic of China, the Republic of Korea, and Thailand had already created legislation governing bills of lading and marine cargo liability regime by incorporating provisions from both the Hague-Visby Rules and the Hamburg Rules.<sup>73</sup>

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<sup>71</sup> See G. Chandler III. 'Hamburg vs. Hague-Visby—The Need for Uniformity' (1996, unpublished paper).

<sup>72</sup> See note 53 above.

<sup>73</sup> See Chapter VII.

The United States is also in the process of amending its legislation for the benefit of the nation at large and also to protect all parties involved in the shipping industry. Australia, in particular, amended the *Carriage of Goods by Sea Act 1992* (Cth) in 1997 by adopting the Hamburg Rules aspects into the law and keep the Hamburg Rules under review whether the Hague Rules should be replaced by the Hamburg Rules.<sup>74</sup>

Arguments as to whether adopting the Hamburg Rules are important deal not only with the benefit to be derived by the country concerned but also international trade as a whole. While uniformity of marine cargo liability regimes is so important that it could facilitate international trade and reduce conflict of laws, achieving such uniformity is a difficult process. The Hamburg Rules may never win widespread international support among countries with significant maritime trade and may not successfully create uniform marine cargo liability regimes, but in certain circumstances the Rules give some improvements, particularly to the shippers benefit. At present, there is sufficient evidence that some of the Hamburg Rules aspects, such as period of carriers' liability, are accepted by many countries, including Australia.

### Conclusions

From the foregoing, it can be concluded that, even though the Hamburg Rules entered into force internationally on November 1 1992, the Rules will not effect the marine cargo liability regime at present or in the near

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<sup>74</sup> See an examination and discussion of Australia's position in Chapter VII.

future. This is because only twenty countries have adopted the Hamburg Rules and none of them is a large shipping nation. Most of the major countries in international trade are still governed the Hague or Hague-Visby Rules, and it seems that no large shipping nation intends to adopt the Hamburg Rules.

The changes to the carrier's liability under the Hamburg Rules are, in fact, theoretical changes to the liability principles and these changes will not have a very great effect on international carriage of goods by sea. However, it is accepted that some aspects of the Hamburg Rules provide a better balance in terms of liability regimes. They are adopted by a number of major shipping nations, such as the United Kingdom, Japan, and the People's Republic of China. Further discussions put forward in Chapter V will examine marine cargo liability regimes and the legal aspects of the Hamburg Rules in Australia and its major trading partners.

## CHAPTER II

### LEGAL ASPECTS OF BILLS OF LADING

#### Introduction

As mentioned earlier in Chapter I, the development of bills of lading began when the ship's master was allowed to deliver the goods to the consignee named in the receipt of the goods. Since then the bill of lading has been developed for use in international sea carriage and is considered a very important shipping document. It is a versatile document and performs several different functions at the same time. The nature of a bill of lading changes with the circumstances in which it is used.<sup>1</sup>

The original function of a bill of lading is as a receipt for the goods. It is usually issued by the carrier or his agent to the shipper of the goods whenever goods are delivered to a ship for carriage. It acknowledges that the goods have been delivered to the ship for carriage and contains some details of the goods shipped. If it is a clean bill of lading, it will state that the goods have been loaded aboard the ship in apparent good order and condition.

From being a receipt from the carrier for the goods, the bill of lading has developed into a document of title to the goods, since it entitles the holder to possession of the goods. The holder of the bill of lading can demand delivery of the goods from the carrier when they arrive at their destination. Therefore, it is possible to transfer the right to demand the goods by transfer of the bill of lading. It is considered that the nature of the

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<sup>1</sup> See generally; M. Davies and A. Dickey, *Shipping Law* (1990) ch. 10; C. Debattista, *Sale of Goods Carried by Sea* (1990) ch. 2 and 5-8; Scrutton on *Charterparties and Bills of Lading* (19th ed., 1984, by A. A. Mocatta, M. M. Mustill, S. C. Boyd); Caver's *Carriage by Sea* (13th ed., 1982, by R. Colinvaux); P. Todd, *Modern Bills of Lading* (2nd ed., 1990); D. A. Butler and W. D. Duncan, *Maritime Law in Australia* (1992) ch. 4.

bill of lading as a document of title is very important to international trade, since it allows the seller to deliver the goods to the buyer through the transfer of documents while the goods are still in transit. Moreover, by transfer of the bill of lading a buyer is entitled to resell the goods.

Another function of a bill of lading is as evidence of the contract of carriage between the carrier and the shipper. Although a bill of lading appears to be a contractual document, it does not always function as the contract of carriage between the carrier and the shipper. In certain circumstances, such as where a shipper charters an entire ship to carry a large quantity of goods, the contract of carriage is the charterparty by which the carrying ship is chartered. However, a bill of lading is still usually issued when the goods are delivered to the ship for carriage. Where a shipper is not a charterer of a ship, he usually makes a contract of carriage with the carrier for carriage of goods. In this case the bill of lading issued by the carrier to the shipper acts as evidence of the contract of carriage.

To sum up, the bill of lading performs three separate but related functions:

1. as a receipt for the goods shipped,
2. as a document of title to the goods shipped, and
3. as evidence of the contract of carriage between shipper and carrier.

Apart from these, a very important role of a bill of lading from the commercial aspect is its function in dealing with documentary credits. Since a bill of lading acts as a document of title to the goods, allowing its holder possession of the goods, it can be used as a means of security to a bank. It is common to pledge the bill of lading to raise finance. This is an important factor in the financing of international sales, particularly for the benefit of the buyer of the goods. It is considered that the bankers' commercial credits are central to the use of bills of lading.<sup>2</sup> The Uniform Customs and Practice for Documentary Credits 1993 Revision (UCP), adopted by the International Chamber of Commerce (ICC), governs all

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<sup>2</sup> P. Todd, *Modern Bills of Lading* (2nd ed., 1990), 54. (This work is cited hereafter as Todd, *Modern Bills of Lading*.)

Documentary Credits usage including bills of lading, sea waybills and combined transport documents.<sup>3</sup>

It should be mentioned that the goods sometimes arrive at their destination before the documents. In this case, the buyers cannot take possession of the goods.<sup>4</sup> For this reason, the bill of lading may no longer be appropriate for some forms of sea trade, and there are arguments that nowadays the bill of lading is unnecessary and should be replaced.<sup>5</sup> As a result of technical advances, new shipping documents have been introduced which are seen as more effective for some purposes than traditional bills of lading. Examples of these shipping documents are sea waybills and combined transport documents. Moreover, the latest development in commercial shipping is Electronic Data Interchange (EDI), which is a computerised system that sends information through computers. The use of an EDI system as electronic bills of lading is considered an appropriate way for some kinds of sea trade.

At present, sea waybills and combined transport documents become more and more important to commercial shipping because the introduction of these documents, especially electronic bills of lading, may eliminate the necessity for paper bills of lading.<sup>6</sup> There are, however, legal and practical problems associated with the operation of these documents. In particular, there are strong arguments that the traditional bills of lading are still necessary in international carriage of goods by sea because of their major function as documents of title to the goods which is necessary to secure payment in financial system.

Another issue relating to the function of bills of lading as a document of title is problems in transfer of property in the goods under a bill of lading. Transferring of the bill does not always transfer the property in the goods under such a bill to the transferee, for example, where the goods are

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<sup>3</sup> The *Uniform Customs and Practice for Documentary Credits*, 1993 Revision (UCP), Article 23-26.

<sup>4</sup> Todd, *Modern Bills of Lading*, 244.

<sup>5</sup> L. J. Lloyd, 'The bill of lading: do we really need it?' [1989] L.M.C.L.Q. 47.

<sup>6</sup> See discussions on electronic bills of lading in Chapter VI.

unascertained cargo. This creates problem concerning the passing of property and the right of the consignee of a bill to sue the carrier in the case where goods are lost or damaged by the carrier.

The plan of this chapter is first to examine the functions of bills of lading. It will look at functions of bills of lading in the area of documentary credits and also consider the use of alternatives to traditional bills of lading; sea waybills, combined transport documents, and electronic bills of lading. The second part of the chapter deals with the transfer of property of the goods under a bill of lading.

## Part I

### Functions of Bills of Lading

#### **The Bill of Lading as a Receipt**

##### **Issue of Bills of Lading**

When the shipper delivers the goods to the carrier, the ship's master or other authorised officer issues an informal receipt known as 'the mate's receipt' to the shipper. The mate's receipt is an acknowledgement that the shipowner has received the goods in the condition stated therein.<sup>7</sup> The goods are then in the shipowner's possession and at his risk. Possession of the mate's receipt is evidence that the holder is entitled to receive the bill of lading and is sufficient to make the carrier responsible for the goods. However, the carrier is not bound to insist on production of the mate's receipt before issuing the formal bill of lading.

The carrier is entitled to issue the formal bill of lading to someone other than the holder of the mate's receipt if that person is proved to be the owner of the goods. The mate's receipt is not a document of title to the

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<sup>7</sup> See P. Todd, *Cases and Materials on Bills of Lading* (1987) 4. (This work is cited hereafter as Todd, Cases.)

goods shipped. Therefore, transfer of mate's receipt without notice to the carrier does not pass the property in the goods.<sup>8</sup> Statements in the mate's receipt are not conclusive against the shipowner but throw on him the burden of disproving them.

The formal bill of lading is usually issued to the shipper in exchange for the mate's receipt. The bill of lading is signed by the carrier or his agent, usually either the ship's master or the carrier's agent. In practice the carrier issues three original bills of lading: the first bill of lading remains with the carrier and is carried with the goods on the ship, the second one is sent to the shipper, and the last one is sent to the consignee of the goods.

There is no definition of 'bill of lading' in the Hague Rules. Article 3 paragraph 3 merely provides that after receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing the leading marks necessary for identification of the goods, the number of packages or pieces or their quantity or weight, and the apparent order and condition of the goods, while paragraph 4 states that such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3.

Under the Hamburg Rules the provisions are quite similar to the Hague Rules but the Rules give the definition of 'bill of lading' in Article 1 paragraph 7 that:

'Bill of lading' means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

The Rules also provide more details in the contents of bill of lading. Article 15 states that the bill of lading must include the following particulars; the general nature of the goods, the name and principal place

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<sup>8</sup> Scrutton, Article 89, 175.

of business of the carrier, the port of loading and the port of discharge under the contract of carriage, etc. Paragraph 2 provides that after the goods have been loaded on board, the shipper can demand from the carrier a 'shipped bill of lading' which must state that the goods are on board a named ship and give the date of loading.

Thus, where the Hague or Hamburg Rules apply, the shipper is entitled to demand the issue of a bill of lading from the carrier. The bill of lading usually acknowledges that the goods have been shipped on board, and may contain statements of the identification, condition, and quantity of the goods, so it is always a receipt whether or not it is at the same time evidence of the contract of carriage or a document of title.

The value of a bill of lading as a receipt depends on the existence and nature of statements on the face of the bill of lading. This function of bills of lading is of importance since it enables its holder, normally the buyer of the goods shipped, to prove whether the carrier delivered goods of exactly the same kind and amount as were stated in the bill of lading. Normally, the bill of lading includes a description of the quantity of goods shipped, either by showing the number of packages, or the weight or volume of the goods shipped in bulk, such as grain or oil.

However, the statements in the bill of lading as to the fact of shipment, quantity of goods shipped or their apparent order and condition are not contractual promises, so a buyer cannot sue in contract merely because the goods are not delivered in the condition stated in the bill of lading.<sup>9</sup> The bill of lading is only *prima facie* evidence of the quantity of the goods shipped, and so the carrier is entitled to adduce evidence that the goods referred to in the bill of lading were not in fact shipped. However, it is considered by Davies and Dickey<sup>10</sup> that, although the bill of lading is only *prima facie* evidence, it is very strong *prima facie* evidence. In order to displace its effect, the carrier must establish beyond reasonable doubt that

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<sup>9</sup> Todd, *Modern Bills of Lading*, 204.

<sup>10</sup> M. Davies and A. Dickey, *Shipping Law* (1990), 193.

the goods were never shipped. As Isaacs J. observed in *Rosenfeld Hillas & Co. Pty Ltd v. The Ship Fort Laramie*.<sup>11</sup>

The necessity of protecting innocent indorsees for value action on the faith of a clean bill of lading [has] led to the establishment of a very strict rule of evidence to which the [carrier] must conform. He has the responsibility of morally convincing the tribunal of the fact that notwithstanding his unqualified statement, an error has been made and the goods were not shipped. A court in such a case refuses to act on a mere balance of probabilities; the evidence of exoneration must be clear and distinct and convincing; it must exclude beyond reasonable doubt the possibility of the goods having been shipped.

If the carrier had reasonable grounds to believe that the goods are not as described by the shipper, he records this fact on the bill of lading. A bill with no qualification added by the carrier is called a 'clean bill of lading', one with qualification added is called a 'claused bill of lading'.

The function of a bill of lading as a receipt is effected by clauses in the bill of lading, in particular statements as to quantities of the goods shipped. Where a bill of lading is claused 'weight or quantity unknown' or 'said to contain' the bill of lading is not even *prima facie* evidence of a shipment against the shipowner of the amount or quantity shipped, and the onus is on the shipper to prove weight or quantity of goods shipped. These clauses are the protection of the carrier's liability.

Even where the Hague or Hamburg Rules apply, the shipper is entitled to demand the issue of a bill of lading which states the quantity or weight of the goods shipped without qualification. However, the shipper usually has no interest in doing so because he is still able to transfer the bill of lading to a third party whether or not it contains statements of quantity, or contains a clause such 'weight or quantity unknown'. Therefore, it is at the consignee or indorsee's risk to accept a claused bill of lading. However, the clean bill of lading is also important if it is to be used in relation to documentary credits.

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<sup>11</sup> (1923) 32 C. L. R. 25 at 33, quote by Davies and Dickey, 193.

### The rule in *Grant v. Norway*

The function of the bill of lading as a receipt is subjected to the major restriction known as the rule in *Grant v. Norway*.<sup>12</sup> The facts of the case were that the endorsees of a bill of lading sued the carrier in tort for the non-delivery of goods for which the carrier's master had signed the bill of lading. It was held that the master had no authority as agent to sign bills of lading for goods not shipped. This was not within the carrier's usual manner of business. The usual manner of business was to give a receipt for goods after shipment, so a receipt given before shipment did not bind the carrier as principal. In other words, the rule in this case is that a shipowner is not bound by statements in a bill of lading for goods that are not shipped. A ship's master has no authority from the shipowner to sign such a bill.

The effect of the rule in *Grant v. Norway* is that if a bill of lading is issued for goods which are not loaded on board the ship, its holder has no action against the shipowner in respect of the goods which are left behind. This is considered to reduce the value of the bill of lading and the carrier is able to avoid responsibility for the act of his agent. Moreover, the indorsee is denied a cause of action through no fault of his own.<sup>13</sup> It should be noted that the decision in *Grant v. Norway* is not limited to the ship's master. It is also applies to any other agent who is in a similar position, such as a loading broker or charterers' agent.

Todd considers that the rule in *Grant v. Norway* is an anomaly, inconvenience and injustice.<sup>14</sup> Debattista considers that the main charge against the decision is that the bill of lading is rendered the least useful precisely where the representations on its face are most likely to produce the largest possible loss to unsuspecting endorsees, who are in the worst possible position to monitor the shipment of the goods.<sup>15</sup>

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<sup>12</sup> (1851) 20 L.J.C.P. 93.

<sup>13</sup> Todd, *Modern Bills of Lading*, 205.

<sup>14</sup> *Id.*, 207.

<sup>15</sup> C. Debattista, 'The Bill of Lading as a Receipt—Missing Oil in Unknown Quantities' [1986] L.M.C.L.Q. 468.

However, the rule in *Grant v. Norway* has survived for 140 years. It was unaffected by the first legislation attempt to overrule it. Section 3 of the *Bills of Lading Act 1855* (U.K.), the same provision in the *Bill of Lading Act 1857* (Tas), must have been directed at the rule, but fails to alter or limit it:

Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laded on board: Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud if the shipper, or of the holder, or of some other person under whom the holder claims.<sup>16</sup>

The reason why section 3 above was not effective is that it operates only against the master or other person signing the same bill of lading, but not against the shipowner. Moreover, an action against the master or agent is of little practical value and they not worth suing. Another reason is that the statutory estoppel in section 3 is only of significance if the bill of lading holder has some cause of action against the master or agent signing the bill of lading. For example, an action for breach of warranty in *V/O Rasnoimport v Guthrie & Co Ltd*<sup>17</sup> where the judge was unable to find a cause of action against a loading broker in respect of which the conclusive evidence provision in section 3. The indorsee in *Rasnoimport* succeeded independently of the section.

The rule in *Grant v. Norway* is effectively overruled where the Hague-Visby Rules or the Hamburg Rules apply and a third party is involved. That is when the bill of lading is transferred to a third party, a consignee or indorsee, who acts in good faith. Article 3 (4) of the Hague-Visby Rules provides that:

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<sup>16</sup> The position has been changed under the *Carriage of Goods by Sea Act 1992* (U.K.).

<sup>17</sup> [1966] 1 Lloyd's Rep. 1.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

Article 16 paragraph 3 of the Hamburg Rules provides that:

(a) the bill of lading is *prima facie* evidence of the taking over or, where a 'shipped' bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) proof of the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.

It should be noted that Article 3 (4) of the Hague Rules applies only to proof of receipt of the goods, not to their shipment, and proof of receipt may not be enough for action against the carrier.

Todd notes further that the rule in *Grant v. Norway* operates only to protect shipowners and charterers but not to protect the master personally.<sup>18</sup> The consignee or indorsee can bring an action against ship's master or carrier's agent for breach of warranty of authority, since he has only actual or apparent authority to sign bills of lading for goods which are actually loaded on board the ship. If he signs bills of lading for goods which are not loaded, he is purporting to exercise authority which he does not have and can be sued for breach of warranty of authority.

At common law the rule in *Grant v. Norway* is still applied in cases where the Hague-Visby or the Hamburg Rules are not applied. However, there is a question whether the rule in *Grant v. Norway* can apply to the case where some goods are shipped and some are left behind, or where the goods described in the bill of lading were shipped but there was some other misrepresentation in the bill of lading. Todd observes on this question that the rule in *Grant v. Norway* applies only where no goods at all have been

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<sup>18</sup> Todd, *Modern Bills of Lading*, 211.

shipped on board.<sup>19</sup> It does not apply to situations where some goods are shipped or there are other misrepresentations in the bill of lading.

Shipowners, however, have attempted to extend the rule in *Grant v. Norway* to cover these situations. For example, in the *Nea Tyhi*<sup>20</sup> the charterers' agents issued the bill of lading to the shipper claused 'shipped under deck' but the goods of plywood were in fact shipped on deck and were damaged by rainwater. The English Commercial Court refused to extend *Grant v. Norway* beyond its own facts and held that since the loading was completed on the date of issue of the bill of lading, the charterer's agents had no actual authority to issue bills of lading stating that the cargo was loaded under deck when in fact it was loaded on deck. There was no reason for the shipper to know that there was an erroneous statement in the bill of lading, and here the charterer's agents had ostensible authority to sign the bills on behalf of the master. The signature bound the shipowner as principal to the contract contained in or evidenced by the bills of lading.

Another example, in the *Saudi Crown*<sup>21</sup> the plaintiffs were purchasers of a quantity of ricebran extractions which were loaded on board the defendant's ship. The sale contract called for a bill of lading dated not later than 15th July 1982. Loading was not completed until July 26th, but the bills of lading issued by the shipowners' agent were falsely dated July 15th. There was conflicting evidence as to whether the bills of lading were signed on July 15th, before the goods were loaded, or were signed backdated after the goods were loaded on board.

The evidence showed that when the plaintiffs accepted the bills they were unaware of the true shipment date, and would have rejected them had they known. Later, they could not use the cargo to meet their commitments and had to purchase additional cargo from other suppliers. Therefore, they claimed damages for misrepresentation from the

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<sup>19</sup> *Id.*, at 209.

<sup>20</sup> [1982] 1 Lloyd's Rep 606.

<sup>21</sup> [1986] 1 Lloyd's Rep 261.

shipowners, and succeeded because the Court refused to extend the rule in *Grant v. Norway* to cover this situation. Sheen J. held that:

I can see no ground for extending *Grant v. Norway* to protect shipowners from liability for the errors of their duly appointed agents. It cannot be said that the nature and limitations of the agents' authority are known to exclude authority to insert the date on the ground that the ascertainment of the correct date is 'obviously quite outside the scope and functions or capacities' of those agents. It was immaterial that the misdated document was a bill of lading. The plaintiffs suffered loss as a result of a false statement made by the defendants' agents as to the date on which the cargo was loaded.<sup>22</sup>

Hence, it should be concluded that the rule in *Grant v. Norway* applies only where no goods at all have been shipped on board. It does not apply to situations where some goods are shipped or there are other misrepresentations in the bill of lading. However, in cases where some goods are shipped and some left behind, the cargo owner may bring a breach of warranty of authority action as in the *Rasnoimport*.

### The Bill of Lading and the Contract of Carriage

Although a bill of lading appears to be a contractual document, it does not always function as the contract of carriage between the shipper of the goods and the carrier. There is a question as to whether the bill of lading contains the contract of carriage or it is merely evidence of the terms under which the goods were delivered to and received by the carrier, since the contract of carriage is made before the bill of lading is issued.

The question arose from the provision in Section 1 of the *Bill of Lading Act 1855* (U.K.)<sup>23</sup> which provided that all rights of action and liabilities in respect of the goods shall have transferred to the indorsee as if the contract contained in the bill of lading had been made with himself. Thus, it is

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<sup>22</sup> *Id.*, at 267.

<sup>23</sup> The Act was repealed by the *Carriage of Goods by Sea Act 1992* (UK).

important to examine the relationship between the bill of lading and the contract of carriage.

### **Relationship Between the Bill of Lading and the Contract of Carriage**

#### The Bill of Lading as Evidence of the Contract of Carriage

It is said that the bill of lading is not itself the contract of carriage, but that it is merely evidence of that contract . The authority for this proposition is the House of Lords decision in *Sewell v. Burdick*<sup>24</sup>. Lord Bramwell said about section 1 of the *Bill of Lading Act 1855*:

There is, I think, another inaccuracy in the statute. . . . It speaks of the contract contained in the bill of lading. To my mind, there is no contract in it. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract.

It is generally accepted, from a commercial point of view, that the bill of lading is only evidence of the contract of carriage between the original shipper and the carrier.<sup>25</sup> The reason for this view is that contracts of carriage, in common with most other contracts, may be made without any written record. At common law, the two basic propositions of general contract law are that bilateral contracts are concluded on the exchange of mutual promises and that contracts generally need no written record for their validity. Therefore, the contract of carriage will be concluded before the issue of the bill of lading, which is normally issued after the goods are shipped. In this case the bill of lading is excellent evidence of the terms of the carriage contract.

#### The Bill of Lading as the Contract Between the Endorsee and the Carrier

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<sup>24</sup> (1884) 10 App Cas. 74. 105.

<sup>25</sup> See Davies and Dickey, ch. 10; 185-222.; C. Debattista, *Sale of Goods Carried by Sea*, ch. 2, 5-8; Scrutton on *Charterparty and Bill of Lading*, Article 32.

Although the bill of lading may be merely a receipt of goods shipped and evidence of the contract of carriage, in the situation where it is passed to an endorsee by the shipper the bill of lading is considered to contain a contract between the carrier and the endorsee.<sup>26</sup> That is in case of CIF sales,<sup>27</sup> where the voyage charter is the shipper. Scrutton notes that this view is not easy to explain.<sup>28</sup> The indorsee has, under the *Bill of Lading Act 1855*, transferred to him by indorsement all rights and liabilities, as if the contract contained in the bill of lading had been made with him. But on the doctrine of Lord Esher in *Rodocanachi v Milburn*<sup>29</sup>, no contract is contained in the bill of lading; it is only a mere receipt. Can the indorsement then pass what does not exist? The editors of Scrutton explain this point by a consideration of the wording of the *Bill of Lading Act* itself:

By section 1 an indorsee is given the same rights and liabilities as if the contract contained in the bill of lading had been made with himself. This presupposes that the bill of lading does contain a contract. But if it is a mere receipt and the governing document is the charterparty it does not do so. Indeed, it does not even evidence a contract. As, however, the words 'the contract contained in the bill of lading' are used in section 1, and a sensible meaning must be given to them, it is submitted that the true meaning is 'as if a contract in the terms set out in the bill of lading had at the time of shipment been made with himself'.<sup>30</sup>

On this issue, Debattista considers that the bill of lading is a contract in the sense that it contains the contractual terms between the buyer, as receiver of the goods, and the carrier. It excludes any terms agreed to between the shipper and the carrier outside the parameters of the bill.<sup>31</sup> He explains

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<sup>26</sup> Scrutton, Article 33; and Debattista, 138.

<sup>27</sup> Where there is an FOB sale, the voyage charterer is the receiver, and the situation arises in reverse. That is, the bill of lading begins the voyage as a document, but then ceases to be so when it comes into the charterer-receiver's hands.

<sup>28</sup> Scrutton on Charterparty, Article 33, 62.

<sup>29</sup> (1886) 18 Q.B.D. 67.

<sup>30</sup> Scrutton on Charterparty, Article 33, 63.

<sup>31</sup> Debattista, *Sale of Goods Carried by Sea*, 138; See also C. Debattista 'The Bill of Lading as the Contract of Carriage-A Reassessment of *Leduc v. Ward*' (1982) 45 *Mod. L. Rev.* 652, 656.

that the reason for the rule is quite clear: the fundamental principle of general contract law is that express terms have contractual force only if they are notified to either party before or at the time of the conclusion of the contract.<sup>32</sup> Thus, the buyer is to be bound only by terms recorded on the bill of lading.

The case cited as authority for this rule is *Leduc v Ward*<sup>33</sup>, an endorsee of a bill of lading sued the carrier for non-delivery of goods and alleged deviation by the carrier. The carrier pleaded that the goods had been lost though a peril of the sea, that the bill of lading exempted him from liability for such loss, and also argued that there was no deviation because the route taken on the voyage had been expressly and orally agreed to by the shipper in a stipulation not recorded on the bill. The Court of Appeal held that that stipulation was not part of the contract between the endorsee and the carrier; that as between those parties, the routes taken was outside that allowed in the bill of lading; and that consequently, the carrier had deviated his way out of the exclusion clause in the bill of lading.

He notes further that it appears from parts of the judgments that the members of the court felt that the bill of lading contained all the terms of the contract of carriage, even as between the carrier and the shipper of the goods. The leading judgment was delivered by Lord Esher who discussed the legal nature of the bill of lading in the following extract:

It is true that, where there is a charterparty, as between the shipowner and the charterer the bill of lading may be merely in the nature of a receipt for the goods, because all the other terms of the contract of carriage between them are contained in the charterparty; and the bill of lading is merely given as between them to enable the charterer to deal with the goods while in the course of transit; but, where the bill of lading is indorsed over, as between the shipowner and the indorsee the bill of lading must be considered to contain the contract, because the

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<sup>32</sup> *Olley v Marlborough Court* [1949] 1 KB 532. A notice in a hotel bedroom purported to limit the liability of the hotel proprietors for loss or damages to customers' property. It was ineffective to do so, because the contract between customer and proprietor had already been concluded, in the reception area, and it was too late for the proprietor to add new terms by means of a notice in the bedroom.

<sup>33</sup> (1888) 20 QBD 475.

former has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods.<sup>34</sup>

### The *Carriage of Goods by Sea Act 1992* (U.K.)

It has been suggested that in practice the question as to whether the bill of lading contains the contract of carriage or is merely evidence of the contract has not created problems.<sup>35</sup> However, there are still legal technical problems on this issue. As Todd states:

When we are talking about the carriage contract, therefore, we mean not only the contract between the carrier and the original shipper of cargo, but also the contract that is usually transferred to subsequent holders of the bill of lading. In the overwhelming majority of transactions, there is no difficulty over this, but the legal mechanisms required do not always work, ....<sup>36</sup>

The problems seem to lie in the interpretation of the unclear words of section 1 of the *Bills of Lading Act 1855*<sup>37</sup>, and there were suggestions that the Act should be amended. In 1992, the *Carriage of Goods by Sea Act 1992* was passed and by this Act the *Bills of Lading Act 1855* was repealed. The application of the new Act is wider than the *Bills of Lading Act* because it applies not only to any bill of lading but also to any sea waybill and any ship's delivery order.<sup>38</sup>

The new Act provides in section 2 (1) that a person who becomes the lawful holder of a bill of lading shall (by virtue of becoming the holder of the bill of lading or the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract. It should be noted that this section provides that all rights of suit under the contract of carriage shall have transferred to the lawful holder of a bill of lading without

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<sup>34</sup> *Id.*, at 479-480., Quote by Debattista in 'The Bill of Lading as the Contract of Carriage-A Reassessment of *Leduc v. Ward*', 658.

<sup>35</sup> See P. Sacks and J. Malbon, (ed.) *Australian Export Manual*, (1992) Chapter 11.

<sup>36</sup> Todd, 89.

<sup>37</sup> See Part 1 of Chapter IV.

<sup>38</sup> Section 1 (1) of the *Carriage of Goods by Sea Act 1992*.

stating that the contract of carriage is contained in the bill of lading, as in section 1 of the *Bills of Lading Act 1855*. However, section 5 (1) provides as definition of 'the contract of carriage' that:

- (a) in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill; and
- (b) in relation to a ship's delivery order, means the contract under or for the purposes of which the undertaking contained in the order is given.

It may be concluded, therefore, that in certain circumstances the contract of carriage is contained in a bill of lading, that is, where the holder of the bill of lading is the endorsee of the bill, such bill contains the contract of carriage between the carrier and the endorsee. In other circumstances, a bill of lading is merely evidence of the contract of carriage, for example, where the holder of the bill is the charterer of a ship or the original shipper of the cargo.<sup>39</sup>

### **Bills of Lading under Charterparties**

Bills of lading are different from charterparties. A charterparty is a contract for the use of an entire vessel and there are various types: demise, voyage and time charterparties. A bill of lading, on the other hand, is not itself the contract of carriage but it is related to specific consignments aboard a ship. Where the shipper of the goods is also the charterer and the bill of lading is issued to him as a receipt of the goods and evidence of the contract, the bill may contain all the terms of the charter or it may contain terms not in the charter. However, this fact will not necessarily vary the contract between the shipowner and the charterer.

In other situations, where cargo is shipped on board a chartered ship (and nearly all ships are chartered), a question arises whether the contract of carriage is made with the shipowner or the charterer. In other words, does the ship's master sign bills of lading on behalf of the owner or the

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<sup>39</sup> More details on the *Carriage of Goods by Sea Act 1992* will be considered in Chapter V.

charterer and which of these parties does the cargo owner sue if the cargo is lost or damaged on the voyage? The answer to these questions is dependant upon the type of charterparty.

Under time charters and voyage charters, the shipowner provides not only the use of ship to carry cargo provided by the charterer, but also the services of the master and crew, who are employed by the shipowner. The shipowner maintains control over the ship management and navigation and the ship's master signs bills of lading as agent of the shipowner. Therefore, the shipowner will be the appropriate party to the contract of carriage.

Demise or bareboat charterparty is the hire of the ship alone; the services and the crew are not included. The charterer takes over the management and control of the ship, and possession of the ship, and employs his own crew. Thus, in this case the charterer is the appropriate party to the contract of carriage.

The situation where the charterer is itself the shipper is that a bill of lading issued to it operates merely as a receipt and document of title. The contract of carriage is contained in the charterparty and not the bill of lading. As a consequence, while the charterer is a shipper, the provisions of the Hague Rules do not apply because the bill of lading does not regulate the relations between the carrier and the holder of the bill as required by the definition of 'contract of carriage' in Article 1 (b) of the Rules. Therefore, to overcome this result, charterparties often incorporate the Hague Rules or contain clauses that have a similar effect.

### **Incorporation of Charterparty Terms in Bills of Lading**

In relation to the carriage contract, bills of lading do not themselves set out all the terms of the contract, but instead commonly incorporate some or all of the terms from a charterparty. Where a bill of lading is issued under the charterparty, charterparty terms can be incorporated in the bill, even where

neither the shipper nor the indorsee is also charterer of the vessel. An obvious problem arises from a term, such as '... all conditions and exceptions as per charterparty...', since the cargo owner may not have seen the charterparty, unless he is also the charterer of the vessel. Therefore, indorsees of bills of lading may be bound by clauses of which they have no knowledge. As a result, banks do not usually accept bills of lading containing such clauses. Article 25 (a) (i) of the Uniform Customs and Practice for Documentary Credits, 1993 Revision provides:

- a. If a Credit calls for or permits a charter party bill of lading, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:
  - i. contains any indication that it is subject to a charter party, and ...

### The Bill of Lading as a Document of Title

The nature of the bill of lading as a document of title is its most significant function. Debattista<sup>40</sup> considers that the common law starts from the assumption that the bill of lading contains the right of demand of physical delivery of the goods at the port of destination. When a bill of lading is issued, only a holder of the bill can demand delivery of the goods from the carrier at the port of discharge. Therefore, transferring of the bill also transfers the right to demand the goods to the transferee. This is the reason why a bill of lading can be used as a document of title. As Devlin J states in *Heskell v Continental Express Ltd.*:<sup>41</sup>

The reason why a bill of lading is a document of title is because it contains a statement by the master of a ship that he is in possession of cargo, and an undertaking to deliver it.

However, Davies and Dickey<sup>42</sup> consider that the concept that the bill of lading acts as document of title to the goods is true only to a limited extent,

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<sup>40</sup> Debattista, *Sale of Goods Carried by Sea*, 29.

<sup>41</sup> [1950] 1 All ER 1033 at 1042B., Quoted by Debattista, *Sale of Goods Carried by Sea*, 29.

<sup>42</sup> Davies and Dickey, 222.

since the bill is not a document which gives title to the goods but is a document which represents title to the goods. Although possession of the bill of lading entitles the holder to possession of the goods, the question of title to the goods is determined by the ordinary rules of the law of personal property; that is, reference to the title of the transferor and the intentions of the parties on transfer.

The function of the bill of lading as a document of title is considered to be its most important function in international sales since it allows traders to effect delivery of the goods through the transfer of documents. Bills of lading can be sent ahead of the goods to whoever will be entitled to claim them from the carrier at their destination, and since the bill of lading can represent the goods it can be transferred not only on the first sale but also on further re-sale of the consignment while it is still in transit. Moreover, it is this function which makes the bill of lading acceptable for a bank as security for an advance in the documentary credits system. Thus, it is essential to examine this function of the bill of lading in these areas: the transferability of the bill of lading, consequences of the transfer of the bill of lading and the cessation of the bill of lading as a document of title.

### **Transferability and Negotiability of Bills of Lading**

The essence of the function of the bill of lading as a document of title is that it is transferable. However, the characteristic of transferability of a bill of lading will exist only when it is expressed to be transferable. In practice this is inferred from the designation of the consignee on the front page of the bill, such as 'Mr. A or Order' or simply as 'Order'. If a bill of lading is stated to be 'non-transferable' or 'non-negotiable', such a bill cannot be a document of title.

Even though the bill of lading can be transferred or negotiated to a third person, there are some limitations on its transferability. The bill of lading can transfer the right to possession of the goods, which is similar to transferring the property in the goods themselves. But it must be the intention of the parties to transfer such property, incorporating the transfer of the bill, and the transferor must be the owner of the goods. The

bill of lading cannot be negotiated like a bill of exchange or a bank note. The transferee cannot have a better title than the transferor.

### Consequences of the Transfer of Bills of Lading

It is accepted that the right to have possession of the goods passes to the transferee by transfer of the bill of lading. The transferee can effectively deal with the goods themselves while they are still in transit. Such dealing can be a re-sale of the goods or raising money by means of pledge of the goods. Sassoon<sup>43</sup> points out that:

The bill of lading enables the buyer or his agent to obtain actual delivery of the goods on their arrival at the port of destination. But the bill of lading has greater significance than that. Possession of the bill of lading is equivalent to possession of the goods, and delivery of the bill of lading to the buyer or to a third party may be effective to pass the property in the goods to such person. The bill of lading is a document of title enabling the holder to obtain credit from banks before the arrival of the goods, for the transfer of a bill of lading can operate as a pledge of the goods themselves. In addition, it is by virtue of the bill of lading that the buyer or his assignee can obtain redress against the carrier for any breach of its terms and of the contract of carriage that it evidences. In other words the bill of lading creates a privity between its holder and the carrier as if the contract was made between them.

There are similar observations by Carver<sup>44</sup> who states that:

The right of have possession of the goods passes to the transferee of the bill of lading: that is the symbol of the goods, and a transfer of it is, symbolically, a transfer of the possession of the goods themselves.

Benjamin<sup>45</sup> also discusses the definition of 'document of title' and points out that it is:

[A] document relating to goods the transfer of which operates as a transfer of the constructive possession of the goods, and may operate as a transfer of the property in them.

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<sup>43</sup> Sassoon, *C.I.F. & F.O.B. Contracts*, (3rd ed, 1984) at para 131.

<sup>44</sup> Carver, *Carriage by Sea*, (13th ed, 1982), at sec. 1596.

<sup>45</sup> Benjamin's *Sale of Goods*, 3rd ed, 1987, at para 1433.

It can be concluded that the transfer of the bill of lading may effectively operate as a transfer of the property to the endorsee of the bill. In many C.I.F. and F.O.B. contracts property will indeed pass on the transfer of the bill of lading, however, it does not always do so. In some situations transfers of bills of lading cannot transfer property in the goods. The circumstances under which property passes are contained in sections 22-23 of the *Sale of Goods Act 1896* (Tas). It is common that property may not pass until long after the bill of lading is transferred since the seller usually has an intention to retain property until the buyer pays the price.

It is clear that the passing of the property depends on the intention of the parties to the bill of lading. Where a bill is tendered to a bank under a documentary credit, the bank obtains only a special property in the goods as pledgee, and not the general property. The intention of the parties is simply to create a security interest, not to pass the property.<sup>46</sup> Also, under section 23 of the *Sale of Goods Act 1896* (Tas) property in part of an undivided bulk cargo cannot pass until the bulk is divided, usually by ascertainment and discharge of the cargo.

The passing of property in the goods and the time when it passes are important to the endorsee, as the buyer of the goods, since both these factors will determine the rights and obligations of the endorsee. Especially affected is the right to sue the carrier when the goods are lost or damaged by the carrier's negligence.<sup>47</sup>

Since the bill of lading performs a function as a document of title and effectively transfers the property in the goods in certain circumstances, the essential consequences of the transfer of the bill of lading seem to lie in the carrier's obligation. That is, the carrier must deliver the goods only to the holder of the bill of lading, as the owner of the goods, or deliver the goods against presentation of the bill of lading. If the carrier delivers the goods without presentation of the bill, the carrier will take all of the

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<sup>46</sup> *Sewell v. Burdick*, (1884) 10 App Cas 74.

<sup>47</sup> More details on the transfer of property will be discussed in Part II below, and Chapter III will be examined the consequence of the transfer of the bill of lading in connection with the right to sue the carrier.

responsibility and do it at his own risk. In *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd.*<sup>48</sup>, the carrier delivered the goods without production of a bill of lading. The consignee did not pay the seller for the goods, and the seller (the consignor) sued the carrier. The Privy Council held that the carrier was liable to the seller for breach of contract.

Liability of the carrier depends on the carrier delivering the cargo to the receiver without production of the original bill of lading. Thus, carriers can protect themselves by storing the cargo in a warehouse and delivering it only against presentation of an original bill of lading. This, however, will be a problem for the carrier if there are not appropriate facilities available or the cargo is not suitable for such storage. For example, oil can usually only be stored in the receiver's store tank. This situation is considered to be one of the limitations of the use of the traditional bill of lading, and leads to the development of new shipping documents, such as sea waybills. This point will be discussed below.

### **When Bills of Lading Ceases to be a Document of Title**

The importance of the bill of lading as a document of title in international sales has already been noted. It is also essential to consider the time when the bill of lading stops being a document of title, because this will affect the rights and obligations of the parties.

It is considered that the function of the bill of lading as a document of title will be completed only when the goods are delivered to the person having a right to demand their delivery from the carrier. When delivery is made to a person entitled, the bill stops being a document of title. Delivery in this context means the physical delivery of the goods to the proper consignee, not only the discharge of the goods from the ship. Where the goods are discharged into a warehouse but not yet delivered to the buyer, the bill of lading is still a document of title. It is still possible to pledge that

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<sup>48</sup> [1959] AC. 576.

bill to a bank, notwithstanding the fact that it has been transferred to the bank after discharge of the goods.<sup>49</sup>

On the other hand, where delivery is made to the buyer without presentation of the bill of lading, the bill stops being a document of title. If the bill of lading is subsequently transferred, it is not intended to transfer the property in or the right to possession of the goods.<sup>50</sup>

### Recent Development Concerning the Form of Bills of Lading

Apart from the traditional form of bills of lading, sea waybills, combined transport documents and Electronic Data Interchange (EDI) nowadays have become more and more common in international trade. These are new shipping documents created in response to advances of technology and in order to replace the traditional bill of lading in some trades where it is no longer appropriate. It is suggested that documents based on models taken from other forms of transportation, such as land or air, would be more appropriate.

The main problem arises from consequences of transfer of the bill of lading which makes the carrier liable if he delivers the goods without presentation of a bill of lading. This will not be a problem if the bill of lading reaches the receiver before the goods arrive at their destination. However, there are cases where the goods, such as oil, are resold many times on the voyage and the bill arrives long after the arrival of the goods.

There is an argument that the bill of lading is unnecessary and should be replaced.<sup>51</sup> This section will examine these new documents by considering their legal functions and their effects in the international market.

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<sup>49</sup> *Meyerstein v Barber* (1866) LR 2 CP 38; and *Barclays Bank v Customs and Excise Comrs* [1963] 1 Lloyd's Rep 81.

<sup>50</sup> *The Delfini* [1988] 2 Lloyd's Rep 599.

<sup>51</sup> See generally, Debattista, *Sale of Goods Carried by Sea*, a ch. 8; Todd, *Modern Bills of Lading*, at ch. 17; L. J. Lloyd, 'The Bill of Lading: Do we really need it ?' [1989] L.M.C.L.Q. 47; G. F. Chandler, 'The Electronic Transmission of Bills of Lading' (1989) 20 *J. Mar. L. & Com.* 4.

## **Sea Waybills**

Sea waybills, simply known as 'Liner Waybills' or 'Straight Bill of Lading', are shipping documents which have a form similar to the traditional bill of lading. They are used when there is no intention to sell the goods while they are in transit, and there is consequently no intention to negotiate the document. They can only be used in shipments which are not re-sold during transit, such as where traders ship goods on their own account or where they sell goods to a trusted customer buying exclusively for his own use. Sea waybills are the sea-going counterparts of consignment notes, used in land transport, and air waybills, used in air transport.<sup>52</sup>

Sea waybills are used on the assumption that they are not documents of title. Thus, the result is that the buyer can obtain delivery of the goods from the carrier without presentation of the actual document to the carrier before delivery. The buyer needs only to prove that he is the person named as consignee on the face of the sea waybill. Therefore, delay of the document causes no problem in relation to delivery of the goods, as it does in the case of delay of a bill of lading. On this point, Todd considers the use of sea waybills as follows:

Obviously, if the bill of lading will reach the consignee before the goods arrive at their destination, there is little point in replacing the conventional bill of lading with a liner waybill. The only reason for using such a document is if the vessel is likely to arrive first.<sup>53</sup>

Although a sea waybill is not considered as a document of title and the consignee does not need to present it to the carrier before delivery, it still operates as a receipt and evidence of the contract of carriage. Therefore, the buyer still needs to have physical possession of the sea waybill in order to use it when he wants to sue the carrier in case of damage to or loss of the goods.

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<sup>52</sup> Debattista, *Sale of Goods Carried by Sea*, 188.

<sup>53</sup> Todd, *Modern Bills of Lading*, 254.

At present, the use of sea waybills is accepted world-wide and recognised by legislation; the *Hamburg Rules* 1978 apply to sea waybills. The *Carriage of Goods by Sea Act* 1992 (U.K.) also applies to the sea waybill and is defined in section 1 (3):

- (3) References in this Act to a sea waybill are references to any document which is not a bill of lading but —
- (a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and
  - (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.

Sea waybills can also be used in documentary credits as provided in Article 24 of the ICC Uniform Customs and Practice for Documentary Credits, 1993 Revision.

- (a) If a Credit calls for a non-negotiable sea waybill covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:
  - i. appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:
    - the carrier or a named agent for or on behalf of the carrier, or
    - the master or a named agent for or on behalf of the master, ...
  - ii. indicated that the goods have been loaded on board, or shipped on a named vessel. ....

### **Combined Transport Documents**

Combined transport operations are sometimes more convenient for today's international sales. The development of containerisation has been significant in increasing the importance of combined transport agreements. The traditional bill of lading has been developing in the area of carriage by sea, and is therefore not well-suited to this type of transport operation. Thus, combined transport documents, simply known as 'Through Bills of Lading', 'Bills of Lading for Combined Transport Shipment' or 'Multimodal Transport Document', are created to be used for this purpose.

Combined transport documents are not documents of title to the goods, since they only confirm that the goods have been received by the carrier. They do not confirm that the goods have been shipped on board, which is the important factor to make the document one of title. However, in practice they occasionally operate as documents of title. This is because the Hague-Visby Rules and the Hamburg Rules provide that when the goods are subsequently loaded aboard the ship, the shipper is entitled to demand a 'shipped on board' bill of lading, provided that it surrenders the 'received for shipment' bill previously issued. In practice, the 'received for shipment' bill is not actually surrendered, but is converted into a 'shipped on board' bill by being indorsed with a stamp to that effect, which records the date when the goods were shipped on board.<sup>54</sup>

The major difficulty with combined transport operations at the international level is that different international conventions may govern each part of the operation, for example, the Convention on the Contract for the International Carriage of Goods by Road<sup>55</sup>, the International Convention concerning the Carriage of Goods by Rail<sup>56</sup>, and the Multimodal Transport Convention.<sup>57</sup> The basis of and limits to liability are different from those under the Hague, Hague-Visby or Hamburg Rules. Thus, the carrier's liability varies depending on where damage to the cargo occurs. A further problem is that it may be difficult to ascertain precisely when the damage occurs, during sea carriage, or over land or air.

In practice, only one carrier, the combined transport operator, has privity of contract with the shipper. The combined transport operator is

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<sup>54</sup> For an example of a 'received for shipment' bill operating as a 'shipped on board' bill when tendered under a letter of credit, see *Westpac Banking Corp. v South Carolina National Bank* (1986) 60 ALJR 358 (PC).

<sup>55</sup> The Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956).

<sup>56</sup> The International Convention concerning the Carriage of Goods by Rail (CIM) (Bern, 7 February 1970).

<sup>57</sup> The Convention on International Multimodal Transport of Goods (MT) (Geneva, 24 May 1980).

responsible for the entire operation; it will be liable in contract to the shipper if the goods are damaged at any stage of carriage.<sup>58</sup>

### **Electronic Data Interchange (EDI)**

Electronic Data Interchange or EDI is the computer-to-computer exchange of business information in a standard format. In other words, it is paperless communication. Its most common application is between two independent firms or trading partners. EDI replaces the physical exchange of routine paper documents, such as requests for quotations, quotations, purchase orders, transportation order, acknowledgments, and invoices.<sup>59</sup>

In the area of sea transport, the EDI system may replace the traditional bill of lading or sea waybill with an electronic bill of lading and introduce a 'paperless system'. For example, a computer print-out in effect takes the place of a conventional waybill under the Atlantic Container Line's Cargo Key Receipt Scheme, and an electronic bills of lading project in Europe (Bolero Project).<sup>60</sup> In this case, it is necessary to send only information or data messages by a computerised system. There is no need to send proof of title and no requirement for delivery against an original document.

It should be noted, however, that an electronic bill of lading has only been used where a negotiable bill of lading is not required, since a computer print-out can never be an original document. It is only a copy of the information in the computer's own electronic record at the time when it is made. Therefore, if a negotiable document of title is required, it would be more difficult to develop an EDI system to replace the traditional bill of lading. However, it would be possible to do so in principle but by changing the law. At present, proposals for EDI systems, such as 'Electrodoc', to be used as a negotiable document of title are under the consideration of the Comité Maritime International (CMI) along with a similar scheme called

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<sup>58</sup> See the New South Wales Court of Appeal's decision in *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd (The Cape Comorin)* (1991) 24 NSWLR 745.

<sup>59</sup> B. Wright, *EDI and American Law: A Practical Guide*, (1989), XIII.

<sup>60</sup> See discussions in Chapter VI below.

'Datalading' developed by the International Trade Facilitation Council.<sup>61</sup> It has been suggested that in the long term an EDI system will replace the traditional bill of lading as well as the sea waybill.

However, at present it appears that an electronic bill of lading does not succeed in practice because there are a number of legal and technical problems. One commentator points out that;

For various reasons, the system (an electronic bill of lading) has so far not proved successful, due partly to the fact that it is a closed system, partly to the reluctance of those involved to move away from traditional documents and partly to the difficulty of introducing a standardised electronic system, . . . Eventually, it may prove possible to develop a wholly electronic system for the transfer of trade data, but there are many problems, both legal and technical.<sup>62</sup>

Electronic bills of lading are one of the main objects in the proposals for reform of Australian bills of lading legislation. The Attorney-General's Department of Australia and the Department of Transport presented a discussion paper<sup>63</sup> on this subject which indicated that there are legal obstacles to the greater use of electronic bills of lading. These obstacles are; the requirement of a document, a document of title and its negotiability, signature and other authentication.

The first and most important legal problem dealing with the usage of electronic bills of lading is the requirement of a document. This is because Australian maritime law, such as the *Carriage of Goods by Sea Act 1991* (Cth), the *Bills of Lading Act 1887* (Tas) or other similar Acts, require a bill of lading or similar document of title to cover a contract of carriage. It seems that if an electronic message is outside the application of the Acts, then the rules governing the rights and liabilities of the parties will be different.<sup>64</sup>

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<sup>61</sup> Wright, *EDI and American Law*, 83.

<sup>62</sup> R. M. Goode, *Proprietary Rights and Insolvency in Sales Transactions*, (1989), 81.

<sup>63</sup> Cth. of Aust., Attorney-General's Department, Revised Discussion Paper: Proposals for Reform of Australian Bills of Lading Legislation (June, 1994) [hereinafter as Discussion Paper].

<sup>64</sup> *Id.*, 24.

The second problem concerning an electronic bill of lading is whether it can perform a function as a negotiable document of title, since this will ensure that the transferee of an electronic bill of lading will have transferred the property in the goods. This problem seems to be unclear and the Discussion Paper points out;

This is largely a technical question - a question, for example of whether the uniqueness of an electronic bill of lading can be guaranteed, not to a level of absolute certainty, but to the same extent as a paper bill of lading.<sup>65</sup>

Examination of legal aspects of electronic data interchange in relation to bills of lading will be discussed in Chapter VI.

## Part II

### Transfer of Property Under a Bill of Lading

#### Introduction

It is obvious that the traditional bill of lading is still important to international carriage of goods by sea because it is the only document that can perform the function as a negotiable document of title and enable the holder of the bill to resell the goods during carriage. The quality of the bill of lading as a document of title is so important that transfer of the bill of lading could at any rate also transfer the property in the goods.<sup>66</sup> The

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<sup>65</sup> *Id.*, 27.

<sup>66</sup> *Todd, Cases*, 14.

passing of the bill, however, does not always transfer the property in the goods to the transferee because the transfer of property under a sale contract is governed by the general provisions of the Sale of Goods Acts.

There are legal problems concerning the transfer of property of the goods and the transfer of the bill of lading, in particular, the question as to when the property in the goods passes from the seller to the buyer. This will be the case especially when bills of lading involve unascertained goods. The major problem concerns the passing of property and the right of the consignee or endorsee of the bill of lading to sue the carrier in the case where the goods are lost or damaged by the carrier.

Another problem relating to the passing of property and the transfer of the bill of lading is connected with risk for loss of or damage to goods during carriage. This is also the main problem for the consignee or endorsee of the bill of lading (as the buyer of the goods carried by sea) because the buyer usually bears all risks for the goods even if the property still does not pass to him. Thus, the consignee or endorsee may have less chance to recover his loss if the goods are lost or damaged by the carrier during carriage as, for example, occurred in the case of *The Aliakmon*.<sup>67</sup>

This part discusses the general principles of law governing the transfer of property in the goods from the seller to the buyer in a contract of sale, and in particular with C.I.F. and F.O.B. contracts. Then it will examine problems in relation to the passing of the property and the transfer of a bill of lading, and also the passing of risk and its consequences.

### Transfer of Property and the Sale of Goods Acts

In a contract of sale the transfer of property in the goods is the major effect of the contract, and also the obligation of the seller, apart from an obligation to deliver the goods. In an international contract of sale there is a problem concerning the transfer of property in the goods sold; that is the

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<sup>67</sup> [1986] 2 Lloyd's Rep 1.

question of when the property passes from the seller to the buyer. This issue will be an important point in considering the buyer's right to claim for damage if the goods are lost or damaged during carriage.<sup>68</sup>

At the international level, the United Nations Convention on the Contracts for the International Sale of Goods 1980<sup>69</sup>, generally known as the 'Vienna International Sales Convention', governs the international sale of goods when both contracting parties are in (different) Contracting States or when the rules of private international law indicate that the governing law of the contract is the law of a Contracting State. The convention, however, governs only the format of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. It is not concerned with the validity of the contract and the effect which the contract may have on the property in the goods sold.<sup>70</sup> Article 30 of the Convention merely provides that: 'The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention'.

It seems that the Convention leaves the question of transfer of property to be considered by the general principles of contract law and the facts of particular cases. Thus, for a contract of sale between parties in different countries, it is up to the parties to agree to use laws of a particular country to govern that contract. Normally, the seller is likely to include a term in the contract of sale which states that any dispute or difference arising out of or relating to the contract, its interpretation or breach shall be settled by the arbitrator in the seller's country, under the laws of the seller's country and the award shall be final and binding upon both parties. Therefore, the laws which govern a contract for international sale may vary and depend on the general terms and conditions of such contract.

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<sup>68</sup> See further discussion in Chapter III.

<sup>69</sup> U.N. Document A/CONF. 97/18 of April 10, 1980. The parties to the Convention are as follows: Argentina, Australia, Austria, Bulgaria, Canada, Chile, China, Czechoslovakia, Denmark, Egypt, Finland, France, Germany, Guinea, Hungary, Iraq, Lesotho, Mexico, Netherlands, Norway, Romania, Spain, Sweden, Switzerland, Syria, USA, Ukraine, USSR, Yugoslavia, and Zambia.

<sup>70</sup> Article 4 of the *United Nations Convention on the Contracts for the International Sale of Goods*.

However, the issue of the transfer of property in the goods from the seller to the buyer is usually governed by the provisions of the Sale of Goods Acts. Even though the provisions normally apply to domestic sales, they may also apply to international sales. Thus, it is essential to consider their general provisions in terms of their application to the international sale contract.

In common law the general rule of the transfer of property in a sale contract under the English Sale of Goods Act is that in a contract for the sale of specific or ascertained goods the property in the goods passes to the buyer when the parties intend it to be transferred, and in a contract for the sale of unascertained goods, no property will pass unless and until the goods are ascertained.<sup>71</sup> This general rule applies to all contracts of sale, including C.I.F. and F.O.B. contracts. Thus, in general, the transfer of property in goods under the sale contract contained in a bill of lading depends on the intention of the parties to that contract. The property does not automatically transfer to the buyer by the indorsement of the bill of lading. However, it is still possible that the whole property may be completely passed by indorsement and delivery of the bill of lading.

In some civil law countries, however, the laws governing the transfer of property in the goods in a sale contract may be different from the general rules at common law. For example, the Civil and Commercial Code of Thailand provides in section 458-460 that:

Section 458. The ownership of the property sold is transferred to the buyer from the moment when the contract of sale is entered into.

Section 459. If a contract of sale is subject to a condition or a time clause, the ownership of the property is not transferred until the condition is fulfilled, or the time has arrived.

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<sup>71</sup> See Section 21, 22 (1) and 23 Rule 5 of the *Sale of Goods Act 1896* (Tas), the *Sale of Goods Act 1923* (N.S.W.), the *Goods Act 1958* (Vic.), the *Sale of Goods Act 1954* (A.C.T.); Section 16, 17(1) and 18 of the *Sale of Goods Act 1952* (S.A.), the *Sale of Goods Act 1895* (W.A.); Section 19, 20 and 21 the *Sale of Goods Act 1896* (Qld.); and Section 20, 21 and 22 the *Sale of Goods Act 1972* (N.T).

Section 460. In case of sale of unascertained property, the ownership is not transferred until the property has been numbered, counted, weighed, measured or selected, or its identity has been otherwise rendered certain.

In case of specific property, if the seller is bound to count, weigh, measure or do some other act or thing with reference to the property for the purpose of ascertaining the price, the ownership is not transferred to the buyer until such act or thing be done.

Therefore, if a contract of international sale is governed by Thai laws, it is clear that the property is transferred from the seller to the buyer at the moment when the contract is made. The application of these provisions may not produce different consequences from the general rules in the Sale of Goods Acts, since the principles on the transfer of property in both ascertained goods and unascertained goods are quite similar. However, in relation to contracts of carriage of goods by sea, in particular the passing of bills of lading, there may be a different approach from the common law countries.<sup>72</sup>

### **Specific or Ascertained Goods**

'Specific goods' or ascertained goods means goods identified and agreed upon at the time a contract of sale is made.<sup>73</sup> Specific goods can be identified from the time of contract as being destined for the buyer or have been appropriated to the buyer's contract. For example, most manufactured goods are appropriated to the contract on shipment. However, even where the goods are manufactured goods, appropriation may not occur until after shipment. If a number of identical consignments are shipped by the same seller for different buyers, appropriation will not take place until the seller has decided which consignment is destined for which buyer. This may not occur until the seller tenders the bill of lading and other shipping

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<sup>72</sup> Thailand has unique legislation governing bills of lading together with its marine cargo liability regime, that is the *Carriage of Goods by Sea Act B.E. 2534 (1991)*. The comparative aspects of the Act in relation to problems in bills of lading will be considered in Chapter VII.

<sup>73</sup> Section 3 of the *Sale of Goods Act 1896* (Tas), see also note 65 above.

documents to the buyer and the property cannot pass until after appropriation has occurred.

The general principle of the passing of property from the seller to the buyer in a contract of sale of specific or ascertained goods is that the property is transferred at the time when the parties intend it to pass. For example, section 22 of the *Sale of Goods Act 1896* (Tas) provides as follows:

- (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
- (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

It is difficult, however, to apply the general principle to cases where the parties have never had any intention in their contract or in their own minds as to when the property should pass. Thus, it is not always clear when property in specific goods does pass to the buyer. In this situation the rules laid down in Section 23 of the *Sale of Goods Act* are applied.<sup>74</sup>

23 Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods pass to the buyer ---

Rule 1 -- Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed.

Rule 2 -- Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state the property does not pass until such thing be done and the buyer has notice thereof.

Rule 3 -- Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not

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<sup>74</sup> Section 23 Rules 1-4 of the *Sale of Goods Act 1896* (Tas), see also note 65 above.

pass until such act or thing be done and the buyer has notice thereof.

Rule 4 --When goods are delivered to the buyer on approval or on 'sale or return' or other similar terms, the property therein passes to the buyer --

- (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
- (b) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods on the expiration of such time and if no time has been fixed on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Sassoon<sup>75</sup> considers the rules in relation to a C.I.F. contract by applying Rules 1-4 to a C.I.F. contract. He concludes that subject to the terms of the contract, the property in specific or ascertained goods does not pass before the goods are shipped, even though the goods are ascertained and agreed at the time the contract is made. This is because as the shipment is a condition of the contract to be performed by the seller and also the document which evidence title to a C.I.F. contract, the bill of lading, cannot normally be issued until shipment arrangements have been completed. Whether the property then passes depends on whether the seller has reserved the right of disposal.

Another important principle in the Sale of Goods Acts is the provision which gives the right to the seller to reserve the right of the disposal of the goods until certain conditions are fulfilled. Section 24 provides that:

24 --(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract the seller may by the terms of the contract or appropriation reserve the right of the disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

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D. M. Sassoon, *C.I.F. and F.O.B. Contract* (2nd ed., 1975) 188.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

The seller will often wish to retain property until the documents are tendered to the buyer, which means he reserves the right of disposal as security against payment of the price. In the case where payment is only to be made against documents, the seller will normally have himself named as the consignee in the bill of lading so the goods will be delivered to or to the order of the seller. The consequence of the reservation of the right of disposal is that property does not pass until payment of the price, which usually takes place on indorsement of the bill of lading. Therefore, the general rule for the passing of property in specific or ascertained goods would be that property passes to the buyer on tender of the bill of lading and other shipping documents.

Todd<sup>76</sup> notes that it is sometimes very difficult to state exactly when property passes. He gives the following guidelines:

(1) It is likely that property in specific or ascertained goods never passes before shipment.

(2) The usual position is for property to pass on indorsement of the bill of lading against the payment of the price since the seller usually retains the bill of lading, and the property in the goods, as security against payment.

(3) Property sometimes passes on shipment, at the same time as risk, or at some time between shipment or indorsement. It is more likely that property passes on shipment where the bill of lading is issued to order of the buyer, or a consignee is named, or the bill of lading is not retained as security against payment.

(4) It would be rare for property in specific goods to pass after indorsement, and this would require an express reservation of title, but it can happen, as in *The Aliakmon*<sup>77</sup> which was an unusual case where the

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<sup>76</sup> Todd, *Modern Bills of Lading*, 49.

<sup>77</sup> *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785. The details of this case will be discussed in Chapter III.

contract was varied and the buyer held the bill of lading as the seller's agent while the property remained in the seller.

### **Unascertained Goods and Appropriation**

The general rule, which seems to be an absolute rule, in the case of unascertained goods is that property in unascertained goods cannot pass to the buyer unless the goods are ascertained. Section 21 of the *Sale of Goods Act 1896* (Tas) provides that:

21 Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Goods are unascertained when the buyer cannot point to the particular goods which are destined for him, for example, a contract for the sale of a part of undivided but specified bulk cargo, whether liquid or dry cargo, such as 500 tons of copra from an undivided bulk of 10,000 tons on a specified ship.

Unascertained goods can become ascertained by a process known as appropriation, and property cannot pass until the goods have been appropriated to the contract by the seller. When the goods are ascertained, property passes on the principles also applicable to specific goods as already discussed. The relevant provision on the appropriation of unascertained goods is Rule 5 of section 23 of the *Sale of Goods Act 1896* (Tas) which provides that:

Rule 5 -- (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in deliverable state are unconditionally appropriated the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of

disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Appropriation is the act whereby the goods are attached to the contract. It is also an unconditional and irrevocable act by the seller. It does not necessarily pass the property to the buyer, but it obliges the seller to deliver to the buyer the particular goods that have been appropriated to the contract.<sup>78</sup> Appropriation is usually the last act performed by the seller and normally takes place at the latest on the shipment. For instance, where identical consignments are shipped by the same seller for different buyers, the goods will not be appropriated to the buyer's contract until the seller has decided which consignment is destined for which buyer. This usually occurs when the seller tenders the bill of lading to the buyer.

In cases where goods are undivided bulk cargo, such as oil or copra, it is common that parts of the bulk will be sold to a number of different buyers, but no individual buyer can state which part of the bulk will be his until it is appropriated to him. This will happen when the bulk is divided on discharge and then the cargo becomes ascertained. Thus, property in parts of an undivided bulk cargo cannot pass until delivery.

Therefore, it could be concluded here that the general rule for the transfer of property in unascertained goods is that property cannot pass unless the goods are ascertained, which usually takes place when the seller tenders the bill of lading to the buyer. If the goods are undivided bulk cargo, property usually passes on delivery. There is, however, an exception to this general rule; that is where the property in an undivided bulk cargo passes during the voyage.

The exceptional case is *The Elafit*<sup>79</sup> which involved unusual circumstances. In the case the buyer had purchased 6,000 tons of copra, which was part of an undivided consignment of 22,000 tons. Some of the cargo was off-loaded to other buyers at intermediate ports of call during the voyage, and eventually, after other transactions, the remaining cargo was destined for

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<sup>78</sup>. Todd, *Modern Bills of Lading*, 189.

<sup>79</sup> [1982] 1 All ER 208.

the buyer. The English Commercial Court held that property passed then, appropriation occurring by process of exhaustion, without the need of any further act by the seller.<sup>80</sup>

### Transfer of Risk

The concept of risk determines which of the parties to the contract of sale are responsible for loss of or damage to the goods at a particular time.<sup>81</sup> If the goods are lost or damaged while at the buyer's risk, he has to pay for them whatever their condition when he actually gets them. To look at it another way, risk deals with the contractual relationship between the parties to the contract of sale. The passing of risk from the seller to the buyer means the seller has discharged his physical duty under the contract of sale to deliver the goods to the buyer.<sup>82</sup>

If risk has already passed to the buyer and the goods are lost or damaged while in transit, the buyer's remedies lie not against the seller, but against the third parties brought into a contractual relationship with the buyer through the shipping documents, the carrier or the insurer. On the other hand, if risk has not passed to the buyer, the seller is still under a duty to deliver goods and still liable to the buyer under the contract of sale for loss of or damage to the goods.

The Vienna International Sales Convention has provisions on passing of risk in Article 66- 70. The important provisions are Article 67 and 68 which indicate the time when the risk passes to the buyer.

Article 67 (1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk

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<sup>80</sup> See also Todd, *Cases*, 124-126.

<sup>81</sup> Todd, *Modern Bills of Lading*, 29.

<sup>82</sup> Debattista, *Sale of Goods Carriage by Sea*, 75.

does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified by the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

Article 68 The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

The general rule for the transfer of risk of loss of or damage to goods in a contract of sale is that unless otherwise agreed, risk passes to the buyer at the same time as the passing of property. This means that the goods remain at the seller's risk until the property is transferred to the buyer, but when the property is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not. Article 25 of the *Sale of Goods Act 1896* (Tas) provides:

25. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not: Provided that, where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault: Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of other party.

The rule normally applies to all contracts of sale, in particular in domestic sale, but in international contracts of sale of goods carried by sea the seller frequently passes the risk to the buyer earlier than the passing of property. There is a general rule for contracts of sale concluded on shipment terms, such as C.I.F. and F.O.B. contracts, that the seller must bear all risks of loss of or damage to the goods until such time as they have passed the ship's

rail at the port of shipment.<sup>83</sup> This means that risk of loss of or damage to goods generally passes to the buyer on or as from shipment.

The reason underlying this can be considered in relation to two important issues, firstly the nature of the contract of the sale of goods carried by sea, and secondly the commercial role of the seller. The first issue is that the time at which the risk passes to the buyer, at the time of shipment, is considered to be convenient in eliminating difficult questions of proof of the time goods were lost or damaged while at sea. In particular, in the case of a chain of sale where the buyer resells the goods during their voyage. In this situation the risk during the whole of the voyage falls upon the eventual purchaser. If risk passes later than shipment, reselling of the goods in transit could be difficult.

Secondly, from the seller's point of view, the seller normally seeks to avoid liability for loss of or damage to the goods when they are shipped; that is, by passing all risks to the buyer on shipment. At the same time, the seller tries to protect himself from a financial danger, if the buyer fails to pay the price, by reserving the right of disposal of the goods or reserving the property of the goods in himself.<sup>84</sup>

Thus, in international sales risk and property are separate, and it is common for property to pass later than risk in C.I.F. and F.O.B. contracts. It

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<sup>83</sup> Incoterms 1990 For CIF, FOB, CFR, FCA and CIP (ICC Publication 460).

'Cost, insurance and freight . . . (named port of destination) CIF

A. The seller must ...

A. 5. Transfer of risks

Subject to the provision of B.5, bear all risks of loss of or damage to the goods until such time as they have passed the ship's rail at the port of shipment. . . .

B. The buyer must ...

B. 5. Transfer of risks

Bear all risks of loss of or damage to the goods from the time they have passed the ship's rail at the port of shipment....

Should he fail to give notice in accordance with B.7, bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the period fixed for shipment, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract good.'

<sup>84</sup> See Debattista, *Sale of Goods Carried by Sea*, 90.

is the general rule that risk of loss or damage to goods passes to the buyer on or as from shipment. The separation of risk and property may cause problems to the buyer since he bears all risks in the goods while the property in them still remains with the seller. One particular problem is concerned with the right of the buyer to sue the carrier if goods are lost or damaged.

### **Transfer of Property under a Bill of Lading**

As already mentioned that transfer of property in the goods from the seller to the buyer is the most important matter to the buyer in cases where the goods are lost or damaged during carriage, the further point to consider being the link between the passing of property and the passing of bills of lading. In normal cases the passing of bills of lading effectively transfers the property in the goods since bills of lading are usually handed over to the buyer when payment is made. Thus, the property in the goods will pass to the buyer who receives the bill of lading. The consequence is that, according to the provision in the bills of lading legislation<sup>85</sup>, all rights of suit and liabilities in respect of such goods will transfer to such buyer as if the contract contained in the bill of lading has been made with himself. It should be concluded that the bill of lading can perform its function as a document of title to transfer the property in the goods in almost every case.

Nevertheless, in some cases the property in the goods may transfer to the buyer at some time other than the transfer of the bill of lading. The two obvious cases are these; firstly when the goods are unascertained goods, especially a part of an undivided bulk cargo, and secondly when the bill of lading is delayed in delivery to the buyer. In the first case, as already mentioned, it is not possible for the property to pass with the bill of lading since the goods must be ascertained first. Thus, the property usually passes

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<sup>85</sup> See for example, The *Bills of Lading Act 1857* (Tas), and The *Carriage of Goods by Sea Act 1992* (U.K.).

when the goods are discharged and delivered to the buyer, not when the bill of lading is passed to the buyer.

In the second situation, as usually happens at present, the bill of lading may be delayed in delivery to the buyer, but the cargo has already arrived and is ready for delivery. If the carrier delivers the goods, with or without an agreement with the seller, to the buyer without presenting the bill of lading, the property then passes to the buyer.<sup>86</sup> Therefore, the property is transferred to the buyer by means of delivery of the goods themselves, and this has happened before the passing of the bill of lading.

### Conclusions

The significant consequences of the passing of property in the goods are firmly linked to the right of the buyer to sue the carrier. It is pointed out, however, that in some respects the property concept is less important in international than in domestic sales<sup>87</sup>, for example, the general rules that risk follows property which often hold in domestic sales are rarely seen in international sales. However, there are two respects in which the passing of property is more important in international sales. Firstly, for the purpose of security against payment; it is essential that the seller retains the property in the goods. Secondly, the buyer's right to sue the carrier depends on whether he has property in the goods.

It is concluded that the present situation of the buyer still depends on the passing of property. Even though there has been a significant change in English Law in order to clarify the time when property passes under the bill of lading where the *Bills of Lading Act 1855* was replaced by the *Carriage of Goods by Sea Act 1992*, the provisions of the new Act seems to have no effect on the link between the passing of property and the question of title to sue the carrier.<sup>88</sup>

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<sup>86</sup> P. S. Atiyah, *The Sale of Goods*, (8th. ed., 1990) 412.

<sup>87</sup> See Todd, *Modern Bills of Lading*, 41.

<sup>88</sup> See further details in Chapter VI.

Even though there are many problems concerning the use of the bill of lading and there are alternatives to it, the bill of lading is still effective and may be more suitable than other shipping documents. It is concluded further that only the traditional bill of lading allows for the resale of the goods during carriage, and no other document facilitates the same flexibility in the financing of transactions. Even if the law is changed, whatever replaces the traditional bill must continue to perform most of the functions currently performed by bills of lading.<sup>89</sup>

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<sup>89</sup> Todd, *Modern Bills of Lading*, 243.

## CHAPTER III

### TITLE OF CONSIGNEES TO SUE CARRIERS

#### Introduction

The consignee of a bill of lading, especially if the consignee has no property in the goods, usually has problems when the goods under that bill are lost or damaged in transit due to the carrier's negligence. The problems arise because in normal contract of sale; C.I.F., C. & F. or F.O.B. contracts, the risk of loss of or damage to the goods is transferred from the seller to the buyer on shipment. Therefore, the consignee, who is the buyer in the contract of sale, cannot sue the seller for any damages because he bears the risk of the goods. A further problem is whether the consignee can bring an action against the negligent carrier in contract or in tort, since he has no relationship with the carrier.

The difficulty of bringing an action against the carrier depends on the consignee's own position; that is, whether or not he is the owner of the goods at the time they were lost or damaged.<sup>1</sup> This is the first and most important point to be considered because if the consignee has property in the goods, he normally has the right to sue the negligent carrier in tort as the consignee is the owner of the damaged goods. On the other hand if he is a non-owning consignee, there are problems in recovering for his loss.

This chapter examines the right of the consignee to sue the carrier, in particular in case of the consignee who has no property in the goods under a bill of lading, a 'non-owning consignee'. The examination falls into three parts. Firstly, this section will examine the title of consignees to sue carriers in contract arising under statute (the *Bills of Lading Act 1857* (Tas) and the *Bills of Lading Act 1855* (U.K.)) and by the implied contract rule in

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<sup>1</sup> See Chapter II.

*Brandt v. Liverpool, Brazil & River Plate System Navigation Co Ltd.*<sup>2</sup> Secondly, the title of consignees to sue carriers in tort will be considered. This section will examine the present situation of the consignee, who is not the owner of the goods, in the context of the decision of the House of Lords in *The Aliakmon*.<sup>3</sup> Comments on this case will then be given, in particular with regard to the practical effect of the case. Thirdly, the situation of the consignees of cargo in Australia will be considered. A comparison to *The Aliakmon* will be made with cases in Australia. In *The Caltex Oil (Australia)*<sup>4</sup> and *The Mineral Transporter*<sup>5</sup> decisions, for example where the plaintiffs who were not owners of the damaged property were held to be entitled to recover for economic loss.

### Title of Consignees to Sue Carriers in Contract

#### **How Title to Sue Passes by Statute**

The parties to a contract of carriage are usually the seller and the carrier. The buyer as the consignee of the goods is not a party to the contract, except where he is the shipper. As a result, there are problems for the consignee when the goods are lost or damaged by the carrier's negligence, because he cannot sue the carrier on the ground of breach of contract. This is because of a fundamental doctrine of common law, 'privity of contract'. This means that only a person who is a party to a contract may sue for its breach, and a third party could have no rights under a contract, even though the benefit in the contract is intended for him.<sup>6</sup>

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<sup>2</sup> [1924] 1 KB 575.

<sup>3</sup> [1986] 2 Lloyd's Rep 1.

<sup>4</sup> [1976] 136 C.L.R. 529.

<sup>5</sup> [1983] 2 N.S.W.L.R. 564.

<sup>6</sup> On 'privity of contract' see, for example, S. J. Stoljar, *A History of Contract at Common Law*, (1975) 135.; J. Livermore, *Exemption Clause & Implied Obligations in Contracts*, (1986) 175.

Even though the bill of lading has a function as a document of title to the goods and it will transfer the property in the goods to the consignee,<sup>7</sup> it cannot transfer the rights and liabilities in respect of the contract of carriage between the seller and the carrier to the consignee. The passing of the *Bills of Lading Act 1855* (U.K.) dealt with the situation by providing that the consignee shall have transferred to him all rights of action and liabilities in respect of the contract as if the contract had been made with himself. It was enacted in Tasmania as the *Bills of Lading Act 1857* (Tas) and also in other states.<sup>8</sup> The Acts were drafted to make the contractual rights pass with the property in the goods. It is stated in the preamble and in Section 1 that:

Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement the property in the goods may thereby pass to the indorsee, but, nevertheless, all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property:...

1. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of action, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Thus, it is clear that the consignee is implied by the Act to be a party to the contract of carriage as if the contract had been made with himself. However, it is necessary to consider the provision of Section 1 which sets of conditions for the consignee to have rights of action against the carrier. According to this section, the consignee will have a contractual relationship with the carrier when the property in the goods shipped passes to him upon or by reason of consignment or indorsement.

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<sup>7</sup> See Chapter II, at p. 68.

<sup>8</sup> *Mercantile Act 1867* (Qld), *Sale of Goods Act 1923* (NSW) ss 50A-50C, *Goods Act 1958* (Vic), *Mercantile Law Act 1936* (SA), Act 20 Vic No 7 1856 (WA).

## **Interpretation of Section 1 of the *Bills of Lading Act 1855***

It is clear from the wording of Section 1 that the transfer of rights and liabilities under the contract of carriage depend on the passing of the property in the goods to the consignee or endorsee. However, it is not clear how property must pass. The question arises from the wording, 'upon or by reason of consignment or indorsement', whether property must pass at the same time as the consignment or indorsement of the bill of lading or not. There are two views on the interpretation of Section 1 of the Act. Firstly, the narrow view which is the literal interpretation of the section and secondly, the wide view which considers the intention of the provision.<sup>9</sup>

The narrow view is mainly expressed by Scrutton<sup>10</sup> that: 'If the property in the goods passes otherwise than upon or by reason of the consignment or indorsement, the right of suit does not pass to the receiver'. This means that the passing of property and the consignment must be synchronised.

On the other hand, Carver<sup>11</sup> holds the wider view that: 'It appears then that the property need only pass from the shipper to the consignee or indorsee under a contract in pursuance of which the goods are consigned to him under the bill of lading, or in pursuance of which the bill of lading is indorsed in his favour'. Thus, from this view the carrier and the buyer are bound provided only that property pass under the contract by virtue of which consignment or indorsement is made.

One of arguments for the wider view is that Section 1 is not effectively drafted to achieve its purpose, perhaps because the law relating to bills of lading was in its infancy in 1855, or perhaps simply because of inaccuracy on the part of the legislature.<sup>12</sup> As in practice in international trade, there

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<sup>9</sup> See P. N. Todd, 'Contract with Consignees and Indorsees' [1984] L.M.C.L.Q. 476.; F. M. B. Reynolds, 'The Significance of Tort in Claims in Respect of Carriage by Sea' [1986] L.M.C.L.Q. 97.; A. P. Bell, 'The Bills of Lading Act 1855 Today' [1985] J. Bus. L. 124.

<sup>10</sup> Scrutton on *Charterparties and Bills of Lading* (19th ed., 1984, by A. A. Mocatta, M. M. Mustill, S. C. Boyd), Article 13.

<sup>11</sup> Carver's *Carriage by Sea* (13th ed., 1982, by R. Colinvaux) para. 98.

<sup>12</sup> Todd, 477.

are some situations where the property in the goods passes to the consignee or indorsee other than upon or by reason of consignment or indorsement. For example, property may pass before consignment or indorsement according to the special terms in the contract of sale, or it may pass after consignment or indorsement in the case of unascertained bulk. It is also arguable that the passing of property depends on the intention of the parties rather than by reason of consignment. As Bramwell B. said in *Sewell v. Burdick*: '... the truth is that the property does not pass by the indorsement, but by the contract in pursuance of which the indorsement is made'.<sup>13</sup>

Recent cases have favoured the wider view, for example, *Pacific Molasses Co v Entre Rios Compani Naviera SA (The San Nicholas)*<sup>14</sup>, *Karlshamns Olje Fabriker v Eastport Navigation Corp (The Elafi.)*<sup>15</sup> and *Enichem Anic SpA v Ampelos Shipping Co Ltd (The Delfini)*.<sup>16</sup> In *The San Nicholas*, the facts are as follows. The defendants were the owner of the vessel *San Nicholas*, which was on charter to Athelqueen Tankers Co.Ltd. under a voyage charterparty. The second plaintiffs were the buyers of a quantity of molasses, the contract of sale contained a clause stating that; 'the title of the molasses and the risk of loss of the molasses shall pass to buyers at the permanent hose connection of the vessel receiving the molasses at the loading port'. The goods were shipped on board the vessel and were lost during voyage. The plaintiffs sued the defendants for the lost of their cargo. The defendants submitted that the plaintiffs were not entitled to sue because they were not parties to the contract within the *Bills of Lading Act* 1855, Section 1, for the property had passed when the molasses went through the permanent hose to the ship and did not pass 'upon or by reason of the consignment or indorsement' of the bill of lading within the meaning of that section.

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<sup>13</sup> (1884) 10 App. Cas. 74, 105, quoted in *Carver's Carriage by Sea*, para. 98.

<sup>14</sup> [1976] 1 Lloyd's Rep. 8.

<sup>15</sup> [1981] 2 Lloyd's Rep. 679.

<sup>16</sup> [1990] 1 Lloyd's Rep. 252.

The English Court of Appeal held that there was at least a *prima facie* case that the property passed to the second plaintiffs by indorsement so as to entitle them to sue under the *Bills of Lading Act 1855*. Lord Denning M. R. was of this opinion regardless of the terms of the contract, and Roskill L.J. rejected the Scrutton's narrow view preferring the wider view. However, in this case the point on the interpretation of Section 1 was not finally decided.

In *The Elafi* it is obvious that the property did not pass either upon or by reason of consignment or indorsement, as required by the narrow view. In this case the goods were unascertained bulk cargo; therefore under the *Sale of Goods Act 1979* (U.K.) property cannot pass until it is ascertained. The Commercial Court of the Queen's Bench Division held that the property passed as soon as ascertainment occurred, and in this case the goods were not ascertained until after indorsement. As Mustill J. said:

On this view of the matter, it is unnecessary to decide the question, for long a matter of controversy, whether the 1855 Act can apply to a transaction where the property passes at some time other than the moment when the bills of lading are indorsed and transferred. I will only say that my own tentative opinion is that it can, so long as the act of indorsement forms an essential link in the chain of events by which title is transferred.<sup>17</sup>

As a result, Section 1 of the *Bills of Lading Act 1855* operated in this case, even though the property in the goods did not pass upon or by reason of consignment or indorsement but passed when the goods were ascertained.

In *The Aliakmon*<sup>18</sup> the facts are as follows. The plaintiffs were C. & F. buyers of a cargo of steel coils. Shipment was to be from Korea to England. The buyers found that they could not resell the goods before the bill of lading was tendered, so they made an agreement with the sellers that the ownership of the goods remained with the sellers and the buyers would have the bill of lading in order to collect the goods on behalf of the sellers. The cargo was damaged during the voyage by the carriers' negligence. The

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<sup>17</sup> *Id.*, at 687.

<sup>18</sup> [1986] 2 Lloyd's Rep. 1.

buyers paid for the price of the goods to the sellers and obtained title, and then sued the carriers for the damage in the tort of negligence. The House of Lords held that the buyers were not entitled to sue the carriers in negligence because they had only a contractual right in relation to the property, they had neither the legal ownership of, nor a possessory title to, the property concerned at the time when the loss or damage occurred.

Although in this case the buyers sued the carriers in the tort of negligence, the decision was concerned with title to sue the carriers in contract. Lord Brandon explained why the buyers could not be entitled to sue the carriers in contract:

The buyer, however, did not acquire any rights of suit under the bill of lading by virtue of s.1 of the *Bills of Lading Act 1855*. This is because, owing to the sellers' reservation of the right of disposal of the goods, the property in the goods did not pass to the buyers upon or by reason of the endorsement of the bill of lading, but only upon payment of the purchase price by the buyers to the sellers after the goods had been discharged and warehoused at Immingham.<sup>19</sup>

From this decision we can see that the narrow view was applied in this case because it was obvious that the property did not pass upon or by reason of consignment. However, the facts in this case were unusual because the buyers held the bill of lading and collected the cargo as agents of the sellers, and the property in the cargo still remained with the sellers. Even though the property finally passed to the buyers after they paid the price to the sellers, they could not have benefit from Section 1 of the *Bills of Lading Act 1855*. This is because the passage of property occurred after the bill of lading ceased to operate as a document of title, since the goods had been discharged and warehoused.

Though property may not pass at the time of consignment or endorsement, it is important that property must pass while the bill of lading is still in force as a document of title. Section 1 will not be satisfied if

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<sup>19</sup> *Id.*, at 4.

property only passes after the bill of lading ceases to operate as a contractual document or as a document of title.<sup>20</sup>

In *The Delfini* the situation was that delivery was completed before the relevant indorsements of bills of lading took place and so there was no transfer of contractual rights to the indorsee. The English Court of Appeal did not accept the wider interpretation of section 1 that rights of suit would be transferred even where property did not pass upon or by reason of the consignment or indorsement. The Court clearly preferred the narrow view.

At present, it seems to be accepted that the narrow view is preferred by the Courts. More recent cases have followed *The Delfini*, such as *Anonima Petroli Italiana S.p.A. v Marlucidez Armardora S.A. (The Filiatra Legacy)*.<sup>21</sup> Those two cases were recently followed in Australia in *BHP Trading Asia Ltd v Oceaname Shipping Ltd (The Arawa Bay)*.<sup>22</sup>

The debate on the interpretation of Section 1 seems to be focused on the relationship between the transfer of the bill of lading and the passage of property. One commentator, Charles Debattista<sup>23</sup>, observes this relationship as the 'temporal link' when the transfer of the bill of lading and the passage of property must happen contemporaneously, and as the 'causal link' if it is sufficient that they occur because of the same contract of sale. He also makes the further comment that one of the problems is that the Act draws too close a link between the transfer of contractual rights and the passage of property. He considers that it would be strange to exclude the application of the Act where the parties make a special term in their sale contract that the property should pass at a moment other than the moment of physical transfer of the bill of lading. He thinks it would be stranger to exclude the application of the Act in the case of unascertained

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<sup>20</sup> See G. H. Treitel Q.C., 'Bills of Lading and Third Parties' [1986] L.M.C.L.Q. 294, 297.

<sup>21</sup> [1991] 2 Lloyd's Rep 337.

<sup>22</sup> (1996) 67 FCR 211.

<sup>23</sup> C. Debattista, *Sale of Goods Carried by Sea*, (1990) 51-53. (This work is cited hereafter as Debattista, *Sale of Goods*.)

bulk goods, trade in which is a significant activity in international commerce.

Even though no firm conclusions can be drawn from this debate, it should be noted that situations where the property passes to the consignees or indorsees at other times than the consignment or indorsement, as in *The San Nicholas* and *The Elafi*, are likely to be frequent in international trade. Thus, if the narrow view is applied in all situations, the consignees or indorsees will not benefit from the purpose of Section 1 of the *Bills of Lading Act 1855*. On the other hand, if the wider view is applied, the consignees seem to have more protection. As Roskill L.J.'s speech in *The San Nicholas* indicated: 'I am disposed to prefer the wider view because the narrow view would in some cases at least greatly lessen the security which those advancing money against shipping documents would acquire, ...'.<sup>24</sup>

Furthermore, there is a suggestion that problems arise for consignees or indorsees of the bill of lading because of the unclear wording of s.1 of the *Bills of Lading Act 1855*, so there would be more benefit to international trade if the Act was amended.<sup>25</sup> Consequently, the *Carriage of Goods by Sea Act 1992* (U.K.) was passed to replace the *Bills of Lading Act 1855*. It was intended that the new Act would avoid the problems of interpretation which occurred with Section 1 of the old Act.<sup>26</sup>

### Where the Act Cannot Apply

In normal cases section 1 of the *Bills of Lading Act 1855*, seems to operate effectively to transfer the rights and liabilities in respect of the goods under the contract contained in the bill of lading to consignees or indorsees. However, in some situations it is obvious that the Act cannot operate, even if the wider view is applied.

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<sup>24</sup> [1976] 1 Lloyd's Rep. 8, 13.

<sup>25</sup> Bell, 132.

<sup>26</sup> The issue of the new provisions and options to reform the *Bills of Lading Act 1857* (Tas) and similar legislation will be discussed in Chapter V.

The first situation is where the consignee holds a bill of lading as a pledgee, for example a bank as a pledgee. This is as a result of the decision of the House of Lords in *Sewell v. Berdick*<sup>27</sup> that a bank which held a bill of lading as a pledgee was not liable by virtue of Section 1 to the shipowner for the freight. The principle in the case is that general property in the goods did not pass to the pledgees because they merely held the bill of lading as security for the advance they had made to the owners of the goods. The nature of the title passed to the consignee on consignment depended on the intention of the consignor and the consignee. Thus, even though the bank is named on the bill of lading as the consignee, it has only a pledgee's right, not a right of general property. As a result, when property does not pass upon or by reason of consignment, the rights and liabilities in respect of the goods will not transfer to the consignee.

The second situation is where the goods are unascertained bulk cargo. Even though there are some special cases where the wider view of the Act has been applied, such as *The Elafi*<sup>28</sup> where property passed by ascertainment which occurred after indorsement, we can see that in this situation property will not pass by virtue of the bill of lading and Section 1 cannot apply because property eventually passes by ascertainment not upon or by reason of consignment or indorsement. There will be more problems if the goods are lost or damaged after indorsement but before they are ascertained because the buyers bear the risk of loss or damage.

The third situation, suggested by P. Todd,<sup>29</sup> is that the Act cannot apply where property passes before the contract of carriage is made. His observation is that because the transfer of right of suit seems to depend on the prior existence of a contract of carriage, rights of suit cannot be transferred if the property passes before consignment. However, property does not normally pass before consignment, because the goods will not be appropriated to the contract at least until shipment. In some circumstances

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<sup>27</sup> (1884) 10 App Cas 74.

<sup>28</sup> [1981] 2 Lloyd's Rep. 679.

<sup>29</sup> Todd, 485.

it may happen as in *The San Nicholas*<sup>30</sup> where the contract of sale had a clause stating that the title of the molasses and the risk of loss of the molasses should pass to the buyers at the permanent hose connection of the vessel receiving the molasses at the loading port. He gives the example that where molasses or oil are piped into a ship from a nearby connection on the dock, appropriation takes place at the latest at the pipe connection on the dock, enabling property to pass before consignment. As a result, there are no contractual rights to be transferred in the situation.

### Implied Contract

It is accepted that no matter how wide the interpretation of section 1 of the *Bills of Lading Act 1855* is, there will be some cases which come outside its scope. For example, where the buyer holds a shipping document other than a bill of lading, or where the holder of a bill of lading holds it as a pledgee and has no general property in the goods. However, at common law it is possible to imply a contract between carrier and consignee. The principle of implied contract at common law is where the bill of lading is presented and the goods delivered on the terms of the bill of lading. The most important case which established this principle is the English Court of Appeal decision of *Brandt v. Liverpool*.<sup>31</sup>

The facts in *Brandt v. Liverpool* are as follows. A number of bags of zinc ashes were shipped on board the vessel *Bernini* at Buenos Aires for the carriage to Liverpool. The shipowners gave a bill of lading stating that the cargo was shipped in apparent good order and condition. Some of the bags had been wet by rain before shipment and became heated. The master of the vessel discharged most of the cargo and reshipped them on another vessel. The goods arrived at Liverpool three months after the arrival of the first vessel. The bill of lading was indorsed to the pledgees who made an advance to the shippers. The indorsees presented the bill of lading and paid the freight to the shipowners and took delivery of the goods. The

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<sup>30</sup> [1976] 1 Lloyd's Rep. 8.

<sup>31</sup> [1924] 1 KB 575.

indorsees took an action against the shipowners for damage for delay in delivery.

The English Court of Appeal held that a contract ought to be inferred between the shipowners and the indorsees of the bill to deliver and accept the goods according to the terms of the bill of lading. It noted:

[A]lthough the plaintiffs, not being indorsees of the bill of lading to whom the property in the goods passed within the meaning of s. 1 of the *Bills of Lading Act 1855*, could not sue on the contract contained therein, yet from the acts of presentation of the bill of lading, payment of the freight, and delivery and acceptance of goods specified in the bill of lading, there might and ought to be inferred a contract between the parties to deliver and accept the goods according to the terms of the bill of lading.<sup>32</sup>

The decision in this case established the principle of implied contract in this contract; that is, when the consignees present the bill of lading to the carriers and provide consideration, such as paying freight or some other charges, and the bill and such consideration are accepted by the carriers, there will be a new contract between the consignees and the carriers based on the terms of such bill of lading.<sup>33</sup>

Hence, if the consignees cannot rely on Section 1 of the *Bills of Lading Act 1855* because property does not pass to them or pass after the bill of lading ceased to operate as a document of title, they may apply the principle of implied contract. However, the important conditions of this rule are the presentation and the acceptance of the bill of lading by the consignees and the carriers.

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<sup>32</sup> *Id.*, at 597.

<sup>33</sup> It should be noted that, many cases have established the proposition that the consignee must do more than merely present the bill of lading. In order for an implied contract to arise, the consignee must also provide consideration in some way, such as by paying freight or some other charges incurred by the carrier. See *Quadro Shipping NV v Bizley and Co Pty Ltd (The Protea Trader)* (1992) 113 FLR 280.

## Title of Consignees to Sue Carriers in Tort

### **Present Situation of Consignees**

At common law it is long established that only the person who has legal ownership of the property can claim in negligence for loss caused to him by reason of loss of or damage to his property. It is not enough to have only a contractual right in relation to that property. Therefore, the situation of consignees who suffered from loss of or damage to cargo must depend on their own position.

The first and most important point to be considered is whether the consignees have general property in the goods or not, and if they have, when is such property transferred to them before or at the time of the damage. If the consignees have legal ownership of the goods at the time they are lost or damaged, such consignees have the right to sue the carriers in the tort of negligence. On the other hand, if they have only a contractual right with the sellers and bear all risks in the goods, it seems that in the present situation of international trade they have no right to sue the carriers in tort.

Moreover, an action in tort by a consignee against the carrier normally has major practical obstacle. This is because the consignee as plaintiff bears the onus of proving when and how the cargo was damaged or lost, and that the damage or loss was caused by the carrier's negligence. In almost all cases, it is very difficult to do so because there is usually no direct evidence about how the loss or damage occurred during the voyage.<sup>34</sup> For this reason the Hague Rules and the Hamburg Rules regimes cast the onus of proof on the carrier once a clean bill of lading and resulting damage or loss have been proved.

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<sup>34</sup> When the cargo simply arrives damaged or does not arrive at all the parties, through their marine surveyors, may offer competing reconstructions of what may have happened during the voyage by making inferences from the state of the cargo on arrival.

The problems discussed in this part will deal with the right of consignees who have no legal ownership of the goods at the time they are lost or damaged. It is now accepted that only the owner of the damaged cargo can sue negligent carriers in tort. The leading case which affirmed this principle is the House of Lords decision in *Leigh and Sullivan Ltd v. Aliakmon Shipping Co. Ltd (The Aliakmon)*.<sup>35</sup> Prior to this case there were cases which set up arguments for and against the right of the consignees to sue the carriers in tort. The arguments involve the important question whether the carriers owe a duty of care to the consignees who have no legal ownership to the property at the time they are lost or damaged.

The following cases will illustrate this important question on the duty of care of the carriers.

### *The Wear Breeze*

In *Margarine Union GmbH v. Cambay Prince Steamship Co. Ltd (The Wear Breeze)*<sup>36</sup> the plaintiffs were C.I.F. buyers, under four separate contracts, of 2,000 tons of copra which were part of a cargo already on board the defendants' ship. Thus, property passed to the plaintiffs when the goods were discharged from the ship and ascertained by parcels of copra separated from the bulk. The goods were then found to have been damaged by cockroaches as the result of the shipowners' negligence in failing to fumigate the vessel adequately before loading. There was no privity of contract between the plaintiffs and the defendants and Section 1 of the *Bills of Lading Act 1855*, could not operate. The Commercial Court of the Queen's Bench Division held that English law did not recognise a duty of care of a shipowner toward anyone who was not the owner of the goods at the time when the tort of negligence was committed. The plaintiffs' action in tort failed because they only acquired ownership of the

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<sup>35</sup> [1982] 2 Lloyd's Rep. 1

<sup>36</sup> [1967] 3 All ER 775.

goods after they were discharged from the ship and the negligence was committed before that time.

The principle in *The Wear Breeze* was not followed in *Schiffahrt und Kohlen GmbH v Chelsea Maritime Ltd (The Irene's Success)*.<sup>37</sup> In the latter case the plaintiffs were C.I.F. buyers of cargo being shipped on board the defendants' ship, but before they became holders of the bill of lading the cargo was damaged by sea water. The plaintiffs were unable to sue the shipowners in contract because they were not the holders of the bill of lading. Instead they brought an action alleging negligence by the defendants, even though they had no title to the goods at the time of the damage. They submitted that in the recent development in the law of negligence what was required to establish negligence was a sufficient relationship of proximity or neighbourhood between the person causing the damage and the person suffering it, and the question of title was irrelevant to that issue.

The Commercial Court of the Queen's Bench Division held for the plaintiffs that there was a sufficient relationship of proximity between the plaintiffs as C.I.F. buyers and the defendants as sea carriers. This gave rise to a duty of care on the part of the defendants, since they ought to have known that under a normal C.I.F. contract the risk passed from the sellers to the buyers on shipment, and the plaintiffs as buyers would be likely to suffer loss if the cargo was damaged by the defendants' negligence.

The significant point of this case is that the buyers had the right to sue the negligent carriers in tort, even though they were not the owners of the goods when the damage was caused. This decision was followed in *The Nea Tyhi*.<sup>38</sup>

*The Irene's Success* and *The Nea Tyhi* are cases which seemed to put consignees or endorsees in a better position in respect of recovering for economic loss, since from the principle in these cases consignees or

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<sup>37</sup> [1982] 1 All ER 218.

<sup>38</sup> [1982] 1 Lloyd's Rep. 606.

endorsees would have been able to sue the carriers in tort for any damage occurring after shipment without considering the point at which they became owners or were entitled to possession of the goods. This is because there was a sufficient relationship of proximity between them and the carriers, and this proximity created a duty of care on the part of the carriers.

However, *The Irene's Success* and *The Nea Tyhi* were overruled in *The Aliakmon*. As mentioned earlier, *The Aliakmon* is now the leading case in the question of the title to sue in tort. It approved the decision in *The Wear Breeze* and settled the position of consignees or endorsees that they cannot sue the shipowners in tort unless they can prove that they have legal ownership or possessory title to the goods at the time of damage.

### *The Aliakmon*

In this case, the buyers contracted to buy from the sellers in Korea a quantity of steel coils which were to be shipped from Korea to England. Payment was required to be made by means of a bill of exchange indorsed by the buyers' bank when the bill of lading was presented 180 days after the date on which it was issued. The buyers intended to resell the steel before payment but were unable to do so and also unable to obtain an indorsement of the bill of exchange from their bank. Therefore, the sellers and the buyers agreed that the buyers would hold the steel 'to the order of' or 'at the disposal of' the sellers, and that the goods would not be resold without the sellers' approval. The cargo was loaded on board the defendants' vessel *Aliakmon*, and was damaged in the course of stowing by stevedores. When the damage to the steel was discovered the buyers brought an action against the shipowners claiming damages for breach of contract and negligence.

The Court of Appeal held that the appeal would be allowed; the buyers had no right to sue the shipowners either in contract or in tort. The buyers had no right to sue in contract because property in the goods did not pass to the buyers upon or by reason of consignment so Section 1 of the *Bills of Lading Act 1855*, could not operate. The buyers were not entitled to sue in the tort of negligence because although there was sufficient proximity between the

parties to establish a duty of care on the part of the shipowners to the buyers, that duty of care did not apply, since it would give rise to an indeterminate liability to an unlimited class and would deprive the shipowners of the protection of the Hague Rules.

The buyers appealed to the House of Lords. The question to be decided was whether the defendants owed a duty of care in tort to the buyers in respect of the carriage of goods on C. & F. terms. The House of Lords held that the appeal would be dismissed as the buyers were not entitled to sue the defendant shipowners. In the judgment Lord Brandon explained that the buyers did not acquire any rights of suit under the bill of lading by virtue of Section 1 of the *Bills of Lading Act 1855*. This was because the buyers and the sellers agreed that the ownership of the goods still remained with the sellers; property did not pass to the buyers upon or by reason of the consignment of the bill of lading. Furthermore, since the buyers held the bill of lading and took delivery of the goods as the sellers' agents, they could not argue that there was an implied contract between them and the shipowners.

As a result of this case, the position of consignees or endorsees was clearly settled: if the buyers have no legal ownership of the goods, or a possessory title to them, they are not entitled to sue the carriers in tort for negligence. This is because the carriers do not owe a duty of care to the buyers.

#### Comments on The Aliakmon

The decision of *The Aliakmon* has had a great effect on the situation of consignees or endorsees who have suffered loss from the carriers' negligence, as at present they cannot recover damages. Even though this is a case with unusual facts, the decision of *The Aliakmon* is the main authority for subsequent cases. That is, buyers who are not the owners of damaged goods at the time when the damage occurs, are not entitled to sue the carriers in tort for negligence. Their damages are considered as economic loss and cannot be recovered.

The judgment of *The Aliakmon* has attracted both positive and negative comments. The positive comments look at the merits of this case, arguing that it shows a good deal of common sense and it is unlikely to have much practical effect in any case. By contrast, some commentators state that the decision in this case is unjust.<sup>39</sup>

On the positive side, one commentator, A.M. Tettenborn, considers that *The Aliakmon* judgment shows a good deal of common sense and causes little if any injustice.<sup>40</sup> This is because, firstly, the decision does not mean that the carriers entirely escape from their liability. Even though they have no liability to the consignees, they still remain liable to the consignors who have legal ownership of the goods when damage occurs. So the consignors can sue the carriers for the benefit of the consignees.

Secondly, the decision avoids two potential problems which could arise if the consignees were allowed to sue the carriers. These two problems deal with the carriers' liability. One is that there could be double liability for the carriers, another is the problem of exemption clauses. Tettenborn gives the following example of the question of double liability. If a consignor sues a carrier for the benefit of the consignee and recovers, but before he can hand over his recovery to the consignee the consignor dissipates it and becomes insolvent, then the consignee can bring an action against the carrier again, subjecting him to double liability for damaging the same goods. The second problem concerns exemption clauses. If the consignee can sue the carrier in tort for negligence, the consignee will not be bound by exemption clauses, which are contained in the bill of lading and are subject to the *Hague Rules*.<sup>41</sup> This is because the consignee is not a party to the contract of carriage. Exemption clauses bind the consignor and exempt

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<sup>39</sup> See the following: B. Markesinis, 'An Expanding Tort Law - The Price of a Rigid Contract Law' (1987) 103 L.Q.R. 354, 384 - 390; and 'The imaginative versus the faint-hearted: Economic loss still in a state of chaos' 45 C.L.J. 384; A.M. Tettenborn, 'The Carrier and the Non-Owning Consignee—An Inconsequential Immunity' (1987) J. Bus. L. 12; Note by M. Clark in [1986] 45 C.L.J. 382; Debbattista, *Sale of Goods Carriage by Sea*, 60-69; G. H. Treitel, 'Bills of Lading and Third Parties', [1986] J.M.C.L.Q. 294.

<sup>40</sup> Tettenborn, 14.

<sup>41</sup> The Hague Rules, Art. 4. Rule 2 (a).

the carrier from liability for negligence in the management of the ship. As a result, the carrier will have no protection from the exemption clauses if the consignee is entitled to sue him.

Thirdly, according to Tettenborne it is unlikely to have much practical effect in any case because normally the transfer of a bill of lading under the *Bills of Lading Act 1855* allows the consignee to sue the carrier in contract. Even though such transfer happens after the damage, the transferee of a bill of lading still obtains all rights of suit against the carrier. If the consignee cannot rely on section 1 of the *Bills of Lading Act 1855*, for example if a bill of lading refers to part of undivided bulk cargo and therefore cannot transfer title to the goods, he may be able to sue in contract under the implied contract rule in *Brandt v. Liverpool*.<sup>42</sup> This provides that presentation of a bill of lading to a carrier and acceptance of it by the latter may cause a new contract between carrier and consignee on the terms of the original bill. Moreover, the effect of *The Aliakmon* is limited to C.I.F. or C. & F. contracts and F.O.B. contracts where the seller retains the documents. There is no problem of a non-owning consignee in the normal case of F.O.B. contract, where title to the goods passes on shipment and the buyer is the shipper.

In the case where the consignee is unable to sue the carrier either in contract or in tort, the consignor could sue for the benefit of the consignee. However, there may be a problem if the consignor becomes insolvent or does not want to take the trouble of engaging in legal proceedings in which he has no substantial interest. Tettenborn suggests that the answer to these questions seems to lie in the drafting of a contract of sale which would include either provision by which the seller agrees to exercise his right for the benefit of the buyer, or an assignment provision which would provide that any right in respect of those goods vested in the seller should be automatically transferred to the buyer on payment by the buyer of the price of the goods. Such a provision would result in an automatic equitable assignment of these rights of suit as soon as payment is made. Therefore, a

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<sup>42</sup> [1924] 1 K.B. 575.

few drafting changes in the contract of sale are needed to avoid the problems of *The Aliakmon*.

On the negative side, the judgment of *The Aliakmon* has been criticised; especially the reasoning of Lord Brandon. Markesinis has been particularly critical, arguing strongly that it is wrong and gives no advantage to international carriage of goods by sea. He regarded *The Aliakmon* as a remarkable case but for all the wrong reasons.<sup>43</sup> The arguments against Lord Brandon's decision are as follows. First, Lord Brandon strongly affirms the principle of law in *The Wear Breeze*<sup>44</sup> that only the person who has legal ownership of or possessory title to the property can sue in tort for negligence, and he claims that if one exception were to be made, others might follow, thus undermining certainty in the law. On this point it must be accepted that there have already been exceptions to the principle, for example, *Anns v. Merton London Borough Council*<sup>45</sup> and *Junior Books Ltd. v. Vetchi Co.Ltd.*<sup>46</sup>, which are cases where economic loss was recovered.

Second, there is the problem of the carriers' protection by exemption clauses which are incorporated into the *Hague Rules*. In *The Aliakmon* it is suggested that the carrier will not obtain protection from the exemption clauses if the consignee is entitled to sue him. This is because the consignee will not be bound by such exemption clauses, as he is not a party to the contract of carriage. However, it is argued that the provisions of the *Hague Rules* shall apply whether the action be found in contract or in tort.

It is clear from both the wording and the history of this Rule that it envisages tort actions, whether or not the claimant had a contract with the defendant ....<sup>47</sup>

There will be no difference if the contract of carriage has been governed by the *Hague-Visby Rules*, since Article IV bis (1) of the Rules provides that:

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<sup>43</sup> Markesinis, 387.

<sup>44</sup> [1967] 2 Lloyd's Rep. 315.

<sup>45</sup> [1978] A.C. 728.

<sup>46</sup> [1983] A.C. 520.

<sup>47</sup> Note by M. Clark in [1986] 45 C.L.J. 382, 383.

The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.

As a result, it would be possible to hold that the carrier is liable to the buyer in tort without depriving him of the benefit of the Rules.

Third, Lord Brandon suggests that where the buyer cannot rely on Section 1 of the *Bills of Lading Act 1855*, or an implied contract, he can protect himself by stipulating that the seller should either sue the carrier for the buyer's benefit or transfer such rights to him by assignment. These suggestions seem to be inconvenient in practice. Moreover, if the buyer takes this advice, he will only have the benefit of such rights as the seller had under the contract of carriage. These may be less extensive than the rights which the buyer would have had if he is entitled to sue the carrier in tort for negligence.

Further comments have been made by C. Debattista who considers that *The Aliakmon* is the case which settles the position of the buyer who has only contractual rights in relation to the damaged goods, such that the buyer cannot sue in tort for negligence. He says that:

[A]fter *The Aliakmon* it is now settled that a plaintiff cannot sue in tort unless he can prove that, at the time of the alleged negligence causing the loss complained of, he had a proprietary interest in the goods, eg ownership or a right to delivery of the goods on discharge.<sup>48</sup>

He also considers the general principle of the law of negligence against the recovery of pure economic loss. The application of the rule is that a receiver of goods can only sue a carrier in negligence when he can prove that damage was caused through the carrier's fault to goods which were owned by the plaintiff receiver or to the delivery of which he was entitled at the time of negligence. According to the general principle, a person who suffers from a negligent act can only recover for foreseeable losses caused by that act where those losses consist of physical injury either to the

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<sup>48</sup> Debattista, *Sale of Goods Carriage by Sea*, 60.

plaintiff or to his property. Other losses are purely economic and they are not recoverable in the tort of negligence.<sup>49</sup>

The point that Debattista makes is that it is quite inappropriate to apply the general principle of the law of negligence against recovery to the area of commercial activity, such as the case of receivers of goods carried by sea in *The Aliakmon*. His reasoning is that to link title to sue in negligence to the passage of risk makes much better sense than linking it to the transfer of a proprietary interest.<sup>50</sup> This is because generally risk passes from seller to buyer on or as from shipment, and the carrier ought to know that the buyer is likely to suffer loss as a result of his negligent acts. He points out that to consider the passage of risk as a matter for the sale contract and of no relevance to the liability of the carrier in tort, is to ignore the sensitive inter-relationship between the contracts making up an international trade transaction.<sup>51</sup> This point is also considered by M. Clarke who finds that it is odd that one rule (insurable interest) allows the C.I.F. buyer to protect his interest in the goods by contracting insurance but another rule denies him (and his insurer) a tort action against the person who does the damage.<sup>52</sup>

Even though the decision in *The Aliakmon* prevents the carrier from being exposed to unlimited liability where the property has not passed, it does not help the situation if property has passed. The real difficulty in *The Aliakmon* is that the contractual rights and liabilities were not transferred to the buyer, and the tort action was in reality a device to avoid the consequences of that.<sup>53</sup> This difficulty has been met by the reforms of the *Bill of Lading Act 1855* (U.K.) by the *Carriage of Goods by Sea Act 1992* (U.K.) to solve the problem of privity of contract in Section 1 of the Act.<sup>54</sup>

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<sup>49</sup> *Id.*, at 62.

<sup>50</sup> *Id.*, at 66.

<sup>51</sup> *Id.*, at 67

<sup>52</sup> Clark, 383.

<sup>53</sup> Note that whether or not the buyer has any action against the carrier in contract, it may be able to bring an action in tort for negligence, assuming negligence can be proved.

<sup>54</sup> See further in Chapter V.

### The Position of Consignees in Australia

Since the decision of the House of Lords in *The Aliakmon* reaffirmed the principle of common law that only persons who have a proprietary interest in damaged goods could recover economic loss in negligence, it seems clear that the non-owning consignees in England could not recover for economic loss. However, consignees who are not owners of damaged property, such as those in *The Aliakmon*, are still in a position to recover for economic loss in the Australian Courts.<sup>55</sup> The two leading cases in Australia where the Courts allowed the plaintiffs to recover losses suffered as a result of damages to property owned by another person are *Caltex Oil (Australia) Pty Ltd v. The Dredge 'Willemstad'*<sup>56</sup> and *Mitsuiosk Lines Ltd v. The Ship 'Mineral Transporter'*.<sup>57</sup>

#### *Caltex Oil (Australia) Pty Ltd v. The Dredge 'Willemstad'*

This case is the first case in which the High Court of Australia allowed the plaintiffs to recover for economic loss. The facts of this case are as follows. The defendant dredge ruptured oil pipelines which lay in the bed of Botany Bay. The pipelines belonged to Australian Oil Refining Pty Ltd (A.O.R.), and they led from A.O.R.'s refinery to a storage terminal owned by the plaintiff, Caltex Oil (Australia) Pty Ltd. There was an agreement between A.O.R. and Caltex that Caltex supplied crude oil to the refinery for processing, and the refined product was delivered through the pipelines to the terminal. The refined oil carried through the pipelines was the property of Caltex, but the terms of the arrangement provided that the risk of loss or damage rested with A.O.R.. As a result of the physical damage to the pipelines suffered by A.O.R., Caltex incurred the expense of transporting refined oil from the refinery to the terminal by alternative means while the pipelines could not be used. Thus, Caltex sued the

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<sup>55</sup> See Davies and Lawson, 'Limiting Shipowners' Liability for Economic Loss' (1988) 16 Aust. Bus. L. Rev. 271; M. Davies and A. Dickey, *Shipping Law*, (1990) 281.

<sup>56</sup> (1976) C.L.R. 529.

<sup>57</sup> [1983] 2 N.S.W.L.R. 564.

owners of the dredge and a marine surveyor, Decca Survey Australia Ltd., who had prepared the charts by which the dredge was navigating.

The High Court of Australia held unanimously that Caltex Oil was entitled to recover the expense from the dredge and the marine surveyor as damages for negligence. However, the reasons given by the justices for the decision differed. Gibbs, Stephen and Mason J. gave the reason that although as a general rule damages are not recoverable for economic loss which is not consequential upon injury to person or property, even if the loss is foreseeable, damages are recoverable in a case in which the defendant has knowledge or the means of knowledge that a particular person, not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence. Jacobs J. merely gave the reason that where foreseeable economic loss arises from a physical effect on the plaintiff's property there is no bar to recovery on the ground only that the loss is economic.<sup>58</sup>

This case has received some criticism to the effect that although it considers the terms of knowledge, means of knowledge, reasonable foreseeability and reasonable contemplation of the defendants, it does not specify exactly who must know or foresee the likely loss to the specific, identified plaintiff. It is still unclear whether the owners of the dredge must know of the likelihood of loss to the specific plaintiff, or whether knowledge on the part of the employee is sufficient to give rise to a duty of care. In this case the owners and the charterers of the dredge were eventually held vicariously responsible for the negligence of their employees.<sup>59</sup>

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<sup>58</sup> (1976) C.L.R. 529. at 530.

<sup>59</sup> Davies and Dickey, 282.

### *The Mineral Transporter*

*Mitsuiosk Lines Ltd. v. The ship 'Mineral Transporter'* is another case where the Supreme Court of New South Wales allowed the plaintiffs (the time-charterers) to recover for economic loss. The facts in this case are as follows. The owner of the ship '*Ibaraki Maru*', the first plaintiff, let the vessel to the second plaintiff by a bareboat charter, and the second plaintiff let it back to the first plaintiff by a time charter of the same date. The *Ibaraki Maru* was damaged while at anchor off Port Kembla, New South Wales, when the defendant's vessel *Mineral Transporter* negligently collided with it. The plaintiffs claimed for lost profits and wasted hire during repairs of the ship against the defendant's negligence.

The Supreme Court of New South Wales, Admiralty Division, held that the time charterer was entitled to recover the amount of hire paid and the profits it lost whilst the vessel was not operational, and the bareboat charterer was entitled to recover the total cost of repairs and the amount by which the hire had been reduced. The reasons for the decision were that because the defendant knew or should have been aware that it was at least likely that the vessel, like many other vessels, would be the subject of a time charter and hence the time charterer would be likely to suffer economic loss as the result of the damage of the ship, it was plainly foreseeable that any time charterer would suffer economic loss if the vessel was damaged.

Another reason is that there was a sufficient degree of proximity between the loss suffered and the negligence of the defendant. *Caltex Oil (Australia)* was considered and applied in this case. However, Yeldham J. did not agree with Gibbs J. in the *Caltex* case that the defendant has to have knowledge that a particular person, not merely as a member of a unascertained class, will be likely to suffer economic loss. He said that:

I do not understand Gibbs J. or Mason J. in '*The Willemstad*' to have stated that knowledge of the precise identity of the plaintiff by the alleged tortfeasor was a necessary ingredient. In my opinion a proper reading of the various judgments indicates that it would be sufficient, in a case such as the present, that the defendant knew or should have been aware

that it was at least likely that the '*Ibaraki Maru*', like many other vessels, would be the subject of a time charter and hence the charterer would be likely to suffer economic loss if the ship was damaged. The fact that a tortfeasor may not know the precise identity of the time charterer is irrelevant.<sup>60</sup>

The defendant appealed to the Privy Council in *Candlewood Navigation Corp Ltd v. Mitsui O.S.K. Lines Ltd*.<sup>61</sup> The Privy Council allowed the appeal on the ground that the first plaintiff was not entitled to recover for the loss of profits and the hire because he sued the defendant as time charterer not as the owner of the vessel, so the fact that the first plaintiff was also the owner of the chartered vessel makes no difference in this case. The Privy Council confirmed the principle of common law that a claim based solely on injury to contractual rights is not allowed; further stating that since the principle has been applied it has become well established that a time charterer could not recover damages for economic loss caused by damage to the chartered vessel by a third party.

The Privy Council considered that in some cases<sup>62</sup> there are special circumstances so that economic loss is recoverable even though there is no physical injury, but they do not affect the principle that a plaintiff cannot recover for economic loss caused by negligent injury to his contractual rights.<sup>63</sup> However, where economic loss is to be regarded as unrecoverable, the law has as a matter of policy allowed the recovery of economic loss only in the following special circumstances:<sup>64</sup>

- (1) where the economic loss is consequential upon physical injury to the plaintiff's person or property,
- (2) where such loss is consequential upon threatened physical injury to the plaintiff's person or property,

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<sup>60</sup> [1983] 2 N.S.W.L.R. 564. at 572.

<sup>61</sup> [1986] A.C. 1 (P.C.)

<sup>62</sup> See *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465., *Ministry of Housing and Local Government v. Sharp* [1970] 2 G.B. 223 and *Ross v. Caunters* [1980] Ch. 297.

<sup>63</sup> [1986] A.C. 1 (P.C.) at 6.

<sup>64</sup> *Id.*, at 7.

(3) where such loss arises not from harm done to the plaintiff's person or property by faulty work but simply from faults being present in the work itself, and

(4) where such loss arises from negligent misstatements made in the context of a special relationship as described in the *Hedley Burne & Co Ltd v. Hell & Partners Ltd.*<sup>65</sup>

The Privy Council, however, decided that *The Mineral Transporter* had no such special circumstances and there was no English case in relation to a time charterparty in which a time charterer has recovered damage for economic loss caused by damage to the vessel by a third party. If a claim by a time charterer is allowed there would be no limitation of the scope of the duty. That is because a vessel is often chartered to more than one charterer. Where there are several sub-charterers they might all suffer economic loss if the shipowner is unable to perform his contractual obligations through the negligence of a wrongdoer.

The Privy Council also commented on the decision of the High Court of Australia in the *Caltex* case which was applied by Yeldham J. in *The Mineral Transporter*. It considered that the decision was not consonant with the authorities and should not be followed. Furthermore, the High Court of Australia is not bound by its own previous decision if it considers that decision to be wrong.<sup>66</sup>

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<sup>65</sup> [1964] A.C. 465.

<sup>66</sup> [1986] A.C. 1 (P.C.) at 8.

## Conclusions

The decisions of *Caltex Oil (Australia)* and *The Mineral Transporter*, as far as the economic loss is concerned, lead to a consideration of the consignees' situation in Australia; that is, whether a consignee who is not the owner of the goods at the time they are lost or damaged can recover for economic loss from the negligent carriers. These two cases considered that there was sufficient proximity between defendants and plaintiffs to give rise to a duty of care on the part of the defendants, so the plaintiffs could recover for economic loss. In a case where the defendant carrier ought to have known that a particular person would be likely to suffer economic loss as a result of his negligence, he owes a duty of care to that particular person.

Even though consignees of cargo differ from the plaintiffs in *Caltex Oil* (owners of the terminal) and *The Mineral Transporter* (time charterers), the principle of law in those cases can apply to consignees. In case of loss of or damage to cargo caused by a carrier's negligence, it is obvious that the carrier will know the identity of the plaintiff because the C.I.F. or C. & F. buyer will be named in the bill of lading as the consignee. Moreover, the carrier will know the exact nature of the economic loss which that plaintiff will suffer if the cargo is damaged by his negligence before the bill of lading has passed from the seller to the buyer, because the nature and value of the cargo are stated in the bill of lading.<sup>67</sup> Therefore, there is reasonable foreseeability that the specific person (identity consignees) will suffer economic loss, and this is regarded as sufficient proximity between carriers and consignees.

Notwithstanding the decision of the Privy Council in *The Candelwood Navigation*, the Supreme Court of New South Wales decision in *The Mineral Transporter* has been considered to have practical consequences for recovery of economic loss. An analysis of this case made by N. J. J. Gaskell<sup>68</sup> raises the point that potential economic claimants are not only

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<sup>67</sup> See Davies and Lawson, 276.

<sup>68</sup> N. J. J. Gaskell, 'Economic Loss in the Maritime Context' [199 ] L.M.C.L.Q. 81.

charterers (time charterers, voyage charterers and sub-charterers) but also others who have contractual arrangements with the ship, such as cargo claimants (cargo owners or consignees of cargo). Thus, there is a possibility for the consignees of cargo or endorsees of bills of lading to recover for economic loss, since they could be regarded as specific victims of the carriers' negligence. However, he also considers that there is difficulty in extending actions in tort for cargo damage because it is not accepted in the general principles of common law that consignees who have no property in the damaged goods have the right to sue in tort for negligence.

Even though the decision of the Supreme Court of New South Wales in *The Mineral Transporter* was reversed by the Privy Council, and the Privy Council strongly criticised the decision in *Caltex Oil (Australia)* in that it was wrong and should not be followed, it was observed that the Australian Courts should not be bound by the decision of the Privy Council and should rather follow the decision of the High Court in the *Caltex* case.<sup>69</sup>

Thus, it is concluded that consignees who suffer economic loss or damage to goods caused by the carriers' negligence, such as the plaintiffs in *The Aliakmon*, can recover in Australian courts. This has been confirmed by the High Court of Australia in *San Sebastian Pty Ltd v. Minister Administering the Environmental Planning and Assessment Act 1979*.<sup>70</sup> The details of this case shows that the High Court is still of the view that purely economic losses are recoverable in negligence in certain circumstances.<sup>71</sup>

It also concluded that, even though tort action against carriers can co-exist with contractual claims, by suing in tort a cargo-owner may be able to avoid contractual exemption clauses. Theoretically, the relationship between cargo-owners and carriers should rest on contractual terms. Furthermore, since the problematic provision in the *Bills of Lading Act 1855* has been repealed by the *Carriage of Goods by Sea Act 1992* by

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<sup>69</sup> This seems to be the effect of *Viro v. The Queen* (1978) 141 C.L.R. 88 in the light of s. 11, Australia Acts (Request) 1985 (Cth).

<sup>70</sup> (1986) A.L.J.R. 41.

<sup>71</sup> Davies and Lawson, 274.

separating the contractual rights from the passing of property, the situation in contractual claims will have less problems and will result in reducing tort actions for economic losses.<sup>72</sup>

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<sup>72</sup> See details of 'Reform of Bills of Lading Legislation' in Chapter V.

## CHAPTER IV

### BILLS OF LADING: THIRD PARTY LIABILITY

#### Introduction

As discussed in Chapter II and III, problems concerning bills of lading in international carriage of goods by sea relate to the forms of bills of lading, transfer of property in the goods from sellers to buyers and title of consignees to sue carriers. This chapter will examine another problem relating to bills of lading; that is liability of carriers, in particular liability of the carrier's servants, agents or subcontractors.

Most liabilities of carriers are provided in international conventions: the Hague-Visby Rules or Hamburg Rules which also provide for some limitation of liability. However, carriers usually incorporate some exemption clauses into contracts of carriage contained in bills of lading in order to exclude and limit their responsibility to other parties, such as the shippers and the consignees.

There is a further problem in dealing with carriers' liability; that is, whether the limitation of carriers' liability by exemption clauses in bills of lading can be extended to protect servants, agents or subcontractors of carriers. It is common for carriers not to carry out all the work of the carriage themselves. They may, for example, employ stevedores to load or discharge the goods or appoint agents or subcontractors to perform some parts of their duties. Thus, there is a question as to whether agents of the carriers or subcontractors engaged by the carriers have a responsibility to the consignees, if the goods are lost or damaged by the negligence of agents or subcontractors of the carriers. This will be the case if the cargo-owner decides to sue the carrier's servants or agents instead of suing the carrier.<sup>1</sup>

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<sup>1</sup> As already discussed in Chapter III, the consignee who has no general property in the goods at the time when the goods are lost or damaged cannot sue the

There has been a complicated legal argument over third party liability and these kinds of exemption clauses in contracts of carriage of goods by sea. The key cases in these issues are the Privy Council decisions of *New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co. Ltd. (The Eurymedon)*<sup>2</sup> and *Port Jackson Stevedoring Pty Ltd v. Salmon & Spraggon (Australia) Pty. Ltd. (The New York Star)*.<sup>3</sup> From these decisions and other recent decisions that support them it seems that the carrier's servants, agents or subcontractors may receive the benefit of exemption clauses in the bill of lading if such clauses are carefully written.

Thus, the first part of this chapter will examine carriers' liability and its limitations, which are provided in the Hague-Visby Rules and the Hamburg Rules. The second part will discuss the problems concerning third party liability, especially liability of carriers' servants, agents or subcontractors. It will examine important past cases on this issue and also consider some recent cases.

### Liability of Carriers under the Amended Hague Rules and the Hamburg Rules

As earlier discussed in the first Chapter, the two major International Conventions; the Hague Rules as amended by the Visby and SDR Protocols and the Hamburg Rules, lay down essential rules relating to bills of lading. These rules govern the contractual relationship between parties to a contract of carriage, normally the carrier and the shipper. In particular, these rules regulate rights and obligations of both parties, especially the carrier's liability. This is because carriers usually have more bargaining power than another party, and a contract of carriage is likely to be a standard form contract which has a number of exemption clauses imposed by the carrier in order to exclude or limit his liability.

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carrier both in contract or tort. Thus, they may sue the carrier's servants or agents.

2 [1974] 1 All ER 1015.

3 [1980] 3 All ER 257.

Both amended Hague Rules and Hamburg Rules incorporate an important common law rule governing carriage of goods by sea contracts, that is the carrier's duty to provide a seaworthy vessel. This means that the carrier is bound to exercise due diligence to make the ship seaworthy and to properly man, equip and supply the ship before and at the beginning of the voyage. The seaworthiness obligation is so important that it is an implied obligation of the carrier whether or not there is an express clause in the bill of lading, and this obligation cannot be limited or excluded by an exemption clause.<sup>4</sup>

### **Liability of Carriers and Contracts of Carriage**

Bills of lading usually contain clauses that are terms of the contract of carriage. These clauses are intended to define the relationship between the contracting parties, the carrier and the shipper. And because the contract is usually transferred to the endorsee of a bill of lading, the contractual relationship could be extended to the subsequent holder of the bill of lading. However, it is obvious that a bill of lading does not contain all the terms of the carriage contract since there may be some contracting terms or additional terms that are incorporated in other documents, such as a charterparty, or terms may be implied by the common law, for example, the carriers' duty to provide a seaworthy vessel.

### **General Liability of Carriers and Contracts of Carriage**

The general liability of carriers and their limitations are already considered above. However, it is essential to emphasise that the carriers' contractual liability usually follows provisions of the Hague, Hague-Visby or Hamburg Rules, depending on which Rules apply to such a contract. Moreover, the carrier is also subject to obligations deriving from the express clauses in the bill of lading, and common law implied obligations.<sup>5</sup> Where one of

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<sup>4</sup> P. Todd, *Modern Bills of Lading*, (2nd ed., 1990) 141.

<sup>5</sup> *Id.*, at Chapter 7, 89 and Chapter 10, 136.

these Rules applies to a contract the provisions of the Rules will overcome the written clauses if they conflict with the rules.

[The Hague, Hague-Visby or Hamburg Rules] stipulate minimum duties of carriers, overriding contrary provisions in the bill of lading. These minimum duties are mandatory, so that the carrier cannot contract out of them, if the Hague, Hague-Visby or Hamburg Rules apply.<sup>6</sup>

Article 3 (8) of the Hague-Visby Rules provides:

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

### **Exemption Clauses and Contracts of Carriage**

It is essential to consider the meaning of 'exemption clauses' and the general rules governing them because they apply to almost every contract, especially standard form contracts such as a contract of carriage. In order to understand how exemption clauses operate and how they cause legal problems in contracts of carriage of goods by sea, it is important to examine these clauses and the rules governing them.

It is common that parties to a contract want to exclude or restrict their duties and liabilities according to such a contract. Therefore, a party who writes a contract usually imposes a clause or clauses, generally known as 'exemption', 'exclusion' or 'exception' clauses<sup>7</sup>, in the contract in order to limit or exclude his own liabilities. However, the term 'exemption clause' is considered to have wider meaning than 'exclusion clause' because the latter refers only to a clause that sets out to exclude liability while

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<sup>6</sup> *Id.*, at 136.

<sup>7</sup> See generally; D. Yates, *Exclusion Clauses in Contract* (1978) Chapter 1, 2 and 5; J. Livermore, *Exemption Clauses and Implied Obligations in Contracts* (1986), Chapter 1 and 6; R. Lawson, *Exclusion Clauses* (1990) Chapter 1.

'exemption clause' means a clause which appears to exclude or restrict liability. The definition of 'exemption clause' is set out as follows:

The term 'exemption clause' is generally used as meaning a clause in a contract or a term in a notice which appears to exclude or restrict a liability which would otherwise arise. ... In relation to the *Trade Practice Act 1974* (Cth) (as amended) s. 68 refers to 'Any term of a contract ... that purports to exclude, restrict or modify - or has that effect'.<sup>8</sup>

Thus, exemption clauses are important parts of a contract since they are contractual terms which are imposed to limit or exclude or modify liability of the party. It is essential to note that an exemption clause may limit or exclude or modify liability not only in contract but also in tort.

The general principle governing the usage of exemption clauses is based on freedom of contract, that is, parties to a contract have rights to contract in whatever terms they want. Thus, the party who has more bargaining power than the other usually purports to limit or exclude his responsibility by using exemption clauses. These clauses may effectively operate to limit, exempt or modify liabilities in certain circumstances. The limitation of liability depends on many factors: the intention of the parties, the construction of exemption clauses, and the facts of a particular case. However, at common law there are general rules to interpret the meaning of exemption clauses to limit their effect. These rules include the strict construction of the exemption clauses against parties relying on that clause and the requirement of notice of exemption clauses<sup>9</sup>.

The first rule is that exemption clauses will be construed against the parties relying on the clause. The courts accordingly will interpret such clause strictly, particularly giving precise legal meaning to technical terms.<sup>10</sup> For example, if the wording in a clause is not clear or there are ambiguities, the courts will construe such a clause against the party who inserts the terms. In *Darlington Futures Ltd. v. Delco Australia Pty. Ltd.*<sup>11</sup>

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<sup>8</sup> Livermore, 1.

<sup>9</sup> *Id.*, at 19-25.

<sup>10</sup> *Id.*, at 19.

<sup>11</sup> (1986) 161 C.L.R. 500.

the High Court of Australia laid down the rule for interpretation as to the meaning of an exclusion clause as follows:

[T]he interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentem* in case of ambiguity.<sup>12</sup>

The second rule is that the notice of exemption clauses or conditions must be available at the time of making the contract. If exemption clauses are contained in an unsigned document, such as a parking ticket, it must be considered whether the party who will be bound by its terms had been given sufficient notice of its terms.<sup>13</sup> However, if there is a signed contractual document, a party who signs it will be bound even if he does not read its contents.

Carriage contracts usually contain exemption clauses and these normally appear in the bill of lading. These clauses limit carriers' liability, for example monetary limitation on the amount of damages of the goods or time limits for claims for compensation. One of the important exemption clauses is that the carrier purports to limit his own liability to the cargo-owner when the damage has been caused by himself or his servants, agents or subcontractors. For example, an exemption clause in a bill of lading may provide that; 'the carrier shall not have any liability or responsibility for or in respect of loss or damage to or in connection with the goods', or that 'the carrier shall not under any circumstances be liable or responsible in any capacity for or in respect of any non-delivery or mis-delivery of goods, delay, or loss or damage of any kind which arises out of or in connection with the carriage covered by this bill of lading'.

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<sup>12</sup> *Id.*, at 510.

<sup>13</sup> Livermore, 24.

## **Exemption Clauses and Third Party Liability**

The major problem in relation to exemption clauses in contract of carriage is whether such clauses can be extended to give protection to a person or persons who are not party to the contract. Since the doctrine of privity of contract prevents any person who is not a party to a contract taking advantage of its terms, third parties, such as servants or agents of the carrier or independent contractors engaged by the carrier, are denied benefit from exemption clauses in a bill of lading. A third party, such as a stevedore, will face difficulty in claiming the protection of exemption clauses in a bill of lading, even though such clauses may expressly extend limitations and protection to third parties.<sup>14</sup>

The clause which has been used with the express intention of extending limitations and protection to third parties, servants or agents of the carrier, and independent contractors, is known as the 'Himalaya Clause'.<sup>15</sup> The Himalaya clause developed as a result of the English Court of Appeal decision in *Adler v. Dickson (The Himalaya)*.<sup>16</sup> In this case the plaintiff was a passenger on a P & O cruise. On going ashore at a port of call, the plaintiff fell from the gangway after it had suddenly come adrift and suffered injuries. The plaintiff sued P & O and the master and boatswain of the ship in negligence. The defendants argued that the limitation of liability set out in the P & O passenger ticket was also available to their employees. The sailing ticket contained the following clause:

The company will not be responsible for and shall be exempt from all liability in respect of any ... injury whatsoever of or to the person of any passenger ... whether the same shall arise from or be occasioned by the negligence of the company's servants ... in the discharge of their duties, or whether by the negligence of other persons directly or indirectly in the employment or service of the company ... under any circumstances whatsoever ....

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<sup>14</sup> See N. E. Palmer, *Bailment* (2nd ed., 1991) 1605 b.

<sup>15</sup> On the 'Himalaya Clause' see for example; Todd, *Modern Bills of Lading*, 217; D.G. Powles, 'The Himalaya Clause' [1979] L.M.C.L.Q. 331; N. E. Palmer, 'The Stevedore's Dilemma: Exemption Clauses and Third Parties' [1974] J. B. L. 101.

<sup>16</sup> [1955] 1 Q.B. 158.

The Court of Appeal held that employees of P & O could not rely on exemption clauses to protect them since they were not party to the contract of carriage. The contract did not refer specifically to the extension of exemption clauses to employees, and such clauses were only available to P & O.

It is considered that in *The Himalaya*, the exemption clause did not afford the servant any protection because it was not appropriately drafted, whereas Himalaya clauses in bills of lading today are much more sophisticated.<sup>17</sup> As a result, the Himalaya clauses operated successfully to protect the third party in *New Zealand Shipping Co. Ltd v. A. M. Satterthwaite*<sup>18</sup>, (*the Eurymedon*), and in *Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Australia) Pty Ltd*<sup>19</sup>, (*the New York Star*). It should be noted that in these two cases the Himalaya clauses were drafted much more comprehensively.

Nevertheless, when the Himalaya clauses, or exemption clauses, are carefully drafted, it cannot be guaranteed that a limitation of liability can be extended to give benefit to third parties. This is because there are complex arguments on the construction and implication of exemption clauses, especially criticism of the decisions in the *Eurymedon* and the *New York Star*.<sup>20</sup> There are different approaches from Courts in England and Commonwealth counties on these two important decisions. For example, the decision in the *Eurymedon* was not adopted in *Philip Morris (Australia) Ltd v. Transport Commission*<sup>21</sup> while the decision in the *New*

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<sup>17</sup> Todd, *Modern Bills of Lading*, 217.

<sup>18</sup> [1975] A.C. 154.

<sup>19</sup> [1980] 3 All ER 257.

<sup>20</sup> For comment on the cases, its background and implications, see N.E. Palmer, *The Stevedore's Dilemma: Exemption Clauses and Third Parties*, [1974] J.B.L. 101; D.G. Powles, *The Himalaya Clause*, (1979) L.M.C.L.Q. 331; P.J. Davies and N.E. Palmer, *The Eurymedon Five Years On*, [1979] J.B.L. 337; L.J. Kovats, *Who is to pay for the Stevedore's Negligence?*, (1974) L.M.C.L.Q. 121; P.H. Clarke, *The Reception of the Eurymedon Decision in Australia, Canada and New Zealand*, (1980) 29 I.C.L.Q. 132; J. Livermore, *Exemption Clauses and Implied Obligations in Contracts*, Chapter 6, p. 183; N.E. Palmer, *Bailment* (2nd ed.), p.1605 b; and P. Todd, *Modern Bills of Lading*, Chapter 15, p. 215.

<sup>21</sup> [1975] Tas. S.R. 128.

*York Star* was adopted in *Broken Hill Pty Ltd v. Hapag-Lloyd Aktiengesellschaft*.<sup>22</sup>

There are arguments, therefore, on the question as to how servants or agents of the carrier obtain benefit from exemption clauses in bills of lading; in other words, how exemption clauses can be extended to protect a third party. The arguments of third party liability focus on its effect on insurance and freight rates.

The following cases will illustrate the background of legal problems of third party liability and the approach of the courts. However, the implications of these cases and some criticisms will be discussed.

### Midland Silicones

In relation to third party claims for protection of exemption clauses in a bill of lading, the House of Lords decision in *Mersey Shipping and Transport Co Ltd. v. Rea*<sup>23</sup> laid down the following principle:

- Where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause.<sup>24</sup>

The decision established a principle of 'vicarious immunity' which gave the protection of exemption clauses to third parties. This principle, however, was disapproved of by the House of Lords in *Midland Silicones Ltd. v. Scrutons Ltd.*<sup>25</sup> and some other cases.<sup>26</sup> Vicarious immunity is therefore a dead doctrine, and can no longer be invoked under modern law.<sup>27</sup>

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<sup>22</sup> (1980) 2 N.S.W.L.R. 572.

<sup>23</sup> (1925) 21 L.I.L.R. 375.

<sup>24</sup> *Id.*, at 378.

<sup>25</sup> [1962] A.C. 445.

<sup>26</sup> *Adler v Dickson* [1955] 2 Q.B. 171.; *Wilson v Darling Island Stevedoring and Lighterage Co Ltd.* [1956] 95 C.L.R. 43.

<sup>27</sup> *Palmer, Bailment* , 1608.

In the *Midland Silicones* case<sup>28</sup> the facts were that a drum of chemicals was shipped from New York to London. A clause in the contract of carriage exempted the carriers from liability above U.S.\$500 per package. While the cargo was being unloaded, it was damaged by stevedores who were the employees of the carriers.

The House of Lords denied the protection of an exemption clause which had been claimed by the stevedores. The stevedores could not make such claim because they were not a party to the contract of carriage.

However, the argument of the stevedores in this case was regarded by Lord Reid as being capable of proving successful in specific circumstances. He said:

I can see a possibility of success of the agency argument if the bill of lading makes it clear that the stevedores are intended to be protected by the provisions in it which limit liability, the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore, the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and that any difficulties about consideration moving from the stevedore were overcome.<sup>29</sup>

### The Eurymedon

This view of Lord Reid in the *Midland Silicones* case opened the possibility of extending the benefit of exemption clauses to third parties and provided a basis for later attempts to provide protection against liability for third parties. The case which accepted and applied Lord Reid's principle was the Privy Council decision in *New Zealand Shipping Co. Ltd v A.M. Satterthwaite*<sup>30</sup>, the *Eurymedon*. In this case, drilling machinery was sent from Liverpool to Wellington by the consignor for transhipment to the plaintiff as consignee in New Zealand under a bill of lading issued by agents for the carrier. The cargo, on arrival at its destination, was

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<sup>28</sup> [1962] A.C. 446.

<sup>29</sup> *Id.*, at 474.

<sup>30</sup> [1975] A.C. 154.

damaged by the negligence of the stevedores. The consignee of the goods sued the stevedores more than one year after the damage arose. The stevedores claimed the protection of the bill of lading which had an exemption clause providing that any claim for damage to the goods must be brought within one year. In fact the stevedore claimed that he was not a third party but a party to the contract.

A clause in the bill of lading provided exemptions and immunities for the carrier and also any servant or agent of the carrier from liability to the shipper, consignee or owner of the goods or any holder of the bill of lading, for loss, damage or delay of the goods. There was also a clause which provided that actions in respect of damage to the goods must be brought within one year.

At first instance, the New Zealand court rejected the stevedores' arguments on the ground that when the bill of lading was signed, the stevedores had not undertaken to perform any obligation in relation to the consignors. However, the court was of the opinion that the consignor's signing of the bill of lading was an offer to whoever unloaded the goods at the final destination, and that they should take advantage of the exemptions given to the carriers in the bill of lading. This unilateral contract contained the benefits of exemption in the main contract between the consignor and the carrier. The New Zealand Court of Appeal reversed the decision and held that the relevant clauses were drawn on the basis of relations between the parties when the bill of lading was signed, not at a later date when a given event took place to supposedly turn the offer into a contract.

The Privy Council, on appeal by the stevedores from the New Zealand Court of Appeal, held that the exemption clauses protected the stevedores. A majority of the Privy Council held that a stevedore who had negligently damaged goods while unloading was protected by a clause in a bill of lading which contained appropriate words exempting it from liability and which was expressed to have been made by the carrier acting as agent on its behalf. Lord Wilberforce's opinion on this case was that the third party, the

stevedores, became a party to the contract through the carrier as agent. The explanation by Lord Wilberforce was that;

[T]he bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual between the shipper and the stevedore, made through the carrier as agent. This became a full contract when the stevedore performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the stevedore should have the benefit of the exemptions and limitations contained in the bill of lading.<sup>31</sup>

### The New York Star

In *Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Australia) Pty Ltd*, the *New York Star*<sup>32</sup>, the plaintiff, Salmond & Spraggon (Australia) Pty. Ltd., was the consignee of a cargo of razor blades shipped on the *New York Star* from Canada to Australia for delivery at Sydney. After discharge from the vessel by the stevedores, Port Jackson Stevedoring Pty Ltd, the cargo was placed in a warehouse, and later stolen. After one year from the time when the goods should have been delivered, the plaintiff brought an action against the stevedores in the Supreme Court of New South Wales, alleging negligence in failing to take care of the goods. The stevedores denied liability and argued that it was exempt from liability by clauses in the bill of lading. Clause 2 of the bill of lading extended the benefit of defences and immunities conferred by the bill on the carrier to independent contractors employed by the carrier. This clause stated:

[T]hat no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper ... for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part ... the carrier is or shall be deemed to be acting as agent ... for the benefit of all persons who are or might be his servants or

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<sup>31</sup> *Id.*, at 167-168.

<sup>32</sup> [1980] 3 All ER 257.

agents from time to time (including independent contractors as aforesaid) ....

Clause 17 of the bill of lading stated:

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the carrier and/or the ship by service of process by an agreement to appear.

At first instance, the trial judge found that the stevedores had been negligent in the care of the goods and that there had been a misdelivery, but that the stevedores had established that it was the agent of the carrier and accordingly Clause 17 of the bill of lading afforded it a defence to the action. The plaintiffs appealed to the Court of Appeal of New South Wales. The Court allowed an appeal on the ground that there was no proof of consideration moving from the stevedores to entitle them to defences in the bill of lading. The High Court of Australia dismissed an appeal by the stevedores.

The stevedores appealed to the Judicial Committee of the Privy Council. The Privy Council held that the stevedores were entitled to claim exemption from liability under Clause 17 of the bill of lading.

### *The Nisshio Iwai*

In relation to carriers' liability, exemption clauses in a bill of lading may effectively exclude or limit carriers' liability if such clauses are clearly worded. In *Nisshio Iwai Australia Ltd v. Malaysian International Shipping Corporation Berhad*<sup>33</sup>, Clause 8 (2) of the bill of lading provided that under no circumstances should the carrier be liable or responsible in any capacity for or in respect of:

- (a) any loss or damage to or in connection with goods which arose after such goods had been delivered or made

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<sup>33</sup> [1989] 167 C.L.R. 219.

available by or on behalf of the carrier at the place of delivery or

...

(d) any loss or damage to or in connection with goods arising or resulting at any time from any cause or event which the carrier could not avoid or the consequences of which the carrier could not prevent by the exercise of reasonable diligence.

In this case a container holding cartons of frozen prawns was stolen after it had been discharged and placed in a stack at a terminal in Sydney by a stevedoring firm engaged by the carrier. The plaintiff who was the endorsee of the bill of lading sued the carrier for breaches of the carriage contract, that is the defendant's duty to carry the cargo and deliver it in good order and condition. The claim was for the non-delivery or loss of the goods. The Supreme Court of New South Wales, Admiralty Division, held that the carrier was not guilty of any negligence in relation to the stacking of the container which was stolen. The carrier was exempt from liability by Clause 8 (2) (d) of the bill of lading.

The Court of Appeal of New South Wales upheld the decision that the carrier was exempt from liability by Clause 8 (2) (d), but one judge, Kirby P., also found that the carrier was protected by Clause 8 (2) (a) which provided that the carrier was exempt from liability in respect of any loss or damage to goods which arose after such goods had been delivered or made available by or on behalf of the carrier at the place of delivery.<sup>34</sup>

This case was appealed to the High Court of Australia by the cargo-owner. The High Court held that the exemption term applied to the non-delivery of the goods and the carrier was exempt from liability by Clause 8 (2) in the bill of lading. The High Court considered and interpreted the wording in the clause, 'loss to goods', and 'loss in connection with goods', as excluding the carrier's liability where there was a complete loss of the goods:

[T]he words 'loss ... in connection with Goods' in cl. 8 (2) (d) should be read as covering 'loss caused by loss of goods', that is, indirect, consequential or financial loss arising from the loss of

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<sup>34</sup> (1988) 12 N.S.W.L.R. 730.

the goods. The Court of Appeal and Yeldham J., therefore, were correct in holding that cl. 8 (2) exempted the carrier from loss or damage resulting from non-delivery of the goods.<sup>35</sup>

### **Circular Indemnities and Sub-Bailment on Terms**

Circular indemnity clauses are a contractual attempt to ensure that third parties cannot be sued at all. When a circular indemnity clause is incorporated in a bill of lading, the cargo-owner will undertake, by an express clause in the bill, not to bring any action against servants, agents and independent contractors engaged by the carrier, or not to sue on terms more favourable than those available against the carrier. Therefore, a circular indemnity clause differs from an exemption clause in that a positive obligation is imposed on the cargo-owner so that it will actually be in breach of the contract of carriage if it bring an action against the third party. In an absolute circular indemnity, the carrier also agrees in its contract with the third party, its agents and independent contractors, to indemnify the third party against any claim brought by the cargo-owner.

The point of circular indemnities is to deprive the cargo-owner from obtaining any benefit from suing the third party. It should be noted, however, that circular indemnities are more complicated than Himalaya clauses and require the participation of the carrier. They are, therefore, not common in bills of lading, except in an adapted and less effective form. They are more commonly found in combined transport documents where one carrier takes responsibilities to the cargo-owner for the entire operation, however, in effect engaging the other carrier as its own independent contractors.

Consideration regarding third party liability should also be given to the concept of sub-bailment on terms. The sub-bailment on terms concept applies in cases where a third party seeks to rely not on an exemption clause or the terms of the main bill of lading contract, as in the case of a Himalaya clause, but on the terms of its own contract with one of the main

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<sup>35</sup> [1989] 167 C.L.R. 219 at p.229.

contracting parties. Usually, the main contracting parties are stevedores and the carriers.<sup>36</sup>

Sub-bailment on terms was considered by the Courts in *The Pioneer Container*<sup>37</sup> and *The Mahkuti*<sup>38</sup> where the Court held that where goods had been sub-bailed with the authority of the owner, the obligation of the sub-bailee towards the owner was that of a bailee for reward and the owner could proceed directly against the sub-bailee under the law of bailment without having to rely on the contract of sub-bailment between the bailee and the sub-bailee. A sub-bailee who voluntarily took goods into its custody can only invoke terms of the sub-bailment qualifying or otherwise affecting its responsibility to the owner if the owner had expressly or impliedly consented to those terms or had ostensibly authorised them.

It should be noted that, the first alternative to Himalaya clauses, that is circular indemnity, is more complicated than Himalaya clauses and required the participation of the carrier. Moreover, the second device, sub-bailment on terms concept, provides no assurance to third parties. Therefore, they normally rely on exemption clauses as terms of the main bill of lading contract.

### Problems of Liability of Carrier and Third Party

In relation to exemption clauses in bills of lading and liability of the carrier and third party, such as servants or agents of the carrier and independent contractors, the carrier's liability is less problematic than third party liability. This is because the carrier is a party to the contract of carriage, and has contractual relationship with the consignor, as the shipper, and the

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<sup>36</sup> See M. Davies, *Australian Maritime Law Decisions 1997*—(Sub-bailment on terms in the context of carriage of goods), (1998) 3 L.M.C.L.Q. 394–410.

<sup>37</sup> [1994] 2 A.C. 324. See B. Andrew, *Sub-bailment on terms: A New Landmark*, (1995) L.M.C.L.Q. 177.

<sup>38</sup> (1996) 3 WLR 1. See PHANG-Andrew and SING Toh-Kian, *On Himalaya Clauses, Bailments, Choice of Law and Jurisdiction: Recent Council Perspectives from The Mahkutai*, (1996) 10 (3) *Journal of Contract Law*. 212.

consignee, as the owner of the goods. As a result, exemption clauses in a bill of lading normally effectively operate to limit or exempt the carrier from liability against other parties. Therefore, the major problem concerning exemption clauses in bills of lading normally involves the Himalaya clause in the context of an extension of protection and limitations of liability provided in bills of lading to a third party.

From the summary of the cases above, the most critical cases were the Privy Council decisions in the *Eurymedon*<sup>39</sup> and the *New York Star*<sup>40</sup> because these two cases allowed the benefit of exemption clauses in the bill of lading to a third party, the stevedoring company which was not a party to the carriage contract. The correctness of the decisions has been questioned and criticised.<sup>41</sup> It is, therefore, essential to examine these cases, both as to the principles that the Privy Council laid down and arguments against them.

### **The Principles in *The Eurymedon* and *The New York Star***

As noted earlier, the defendant in the *Eurymedon*, a stevedoring company, argued that he was entitled to gain benefit from exemption clauses in the bill of lading since he was actually engaged in the contract through the carrier as agent. The New Zealand court, at first instance<sup>42</sup>, rejected this argument on the ground that when the bill of lading was signed, the stevedores had not undertaken to perform any obligation in relation to the consignors. The agency argument was not sustainable. However, Beattie J. was of the opinion that the consignor's signing of the bill of lading was an offer to whoever unloaded the goods at the final destination that they should take the benefit of the exemptions given to the carriers in the bill of lading. This unilateral contract contained the benefits of exemption in the main contract between the consignor and the carrier.

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<sup>39</sup> [1975] A.C. 154.

<sup>40</sup> (1980) 144 CLR 300.

<sup>41</sup> See for example; F. D. Rose, 'Return of the Antipodes' (1981) 44 *Mod. L. Rev.* 336; F. M. B. Reynolds, 'Again the Negligent Stevedore' (1979) 95 *L. Q. R.* 183.

<sup>42</sup> [1971] 2 *Lloyd's Rep.* 339; [1972] N.Z.L.R. 385.

The New Zealand Court of Appeal reversed Beattie J.'s decision and held that the construction of the bill of lading as a unilateral contract did not help the stevedores since the bill of lading was not so phrased to be construed as an offer of immunity capable of acceptance. The relevant clauses were drawn on the basis of relations between the parties when the bill of lading was signed, not at a later date when a given event took place to supposedly turn the offer into a contract.<sup>43</sup>

The Privy Council, on appeal by the stevedores from the decision of the New Zealand Court of Appeal, held by a majority that the exemption clause in the bill of lading did protect the stevedores.<sup>44</sup> The Privy Council relied on Lord Reid's conditions in the *Midland Silicones* case, and such conditions were considered to be satisfied. The Privy Council construed Clause 1. in the bill of lading in the way that it was designed to cover the whole carriage from loading to discharge by whomsoever it was performed. Clause 1. stated:

It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this Bill of Lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be

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<sup>43</sup> [1973] N.Z.L.R. 174.

<sup>44</sup> [1974] 1 All ER 1015; [1975] A.C. 154.

deemed to be parties to the contract in or evidenced by this Bill of Lading.

Lord Wiberforce, in delivering the majority opinion, pointed out that by this clause the shipper agreed to exempt from liability the carrier, his servants and independent contractors in respect of the performance of the contract. He said:

Thus, if the carriage, including the discharge, is wholly carried out by the carrier, he is exempt. If part is carried out by him, and part by his servants, he and they are exempt. If part is carried out by him and part by an independent contractor, he and the independent contractors are exempt. The exemption is designed to cover the whole carriage from loading to discharge, by whomsoever it is performed: the performance attracts the exemption or immunity in favour of whoever the performer turns out to be.<sup>45</sup>

Lord Wiberforce also remarked that the stevedore became a contracting party to the consignee since the bill of lading brought into existence a bargain, initially unilateral but capable of becoming mutual, between the shippers and the stevedore, made through the carrier as agent.<sup>46</sup> Prior to this case, the point arose as to whether the stevedoring company engaged by the shipowner could be regarded as an agent of the shipowner in the decision of the High Court of Australia in *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd.*<sup>47</sup> In that case the Court was of the opinion that a stevedoring company was not an agent of the shipowner. Fullager J. stated:

[T]he word 'agent' appears to me to be often misused in this connection ... It seems to me quite wrong to say that a stevedoring company engaged by a shipowner to load or unload a ship is an agent of the shipowner, just as it would be wrong to say that a builder is an agent of a building owner. If A engages B to lay out a garden for him, and B engages C to do the actual work, C is not in any intelligible legal sense B's agent. B is an independent contractor with A. Agency in the legal sense does not come into the matter.

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<sup>45</sup> [1974] All ER 1015, at 1020.

<sup>46</sup> *Ibid.*

<sup>47</sup> (1956) 95 C.L.R. 70.

This point was argued by Lord Wilberforce on the basis of the four conditions laid down by Lord Reid in the *Midland Silicones* case, which opened up possibility for a third party to claim benefit from exemption clauses in contracts of carriage. In this case such conditions were satisfied because:

1. the bill of lading clearly stated that the stevedore was intended to be protected by exemption clauses,
2. the carrier contracted as agent of the stevedore,
3. the carrier had authority from the stevedore to do so, and
4. difficulties about consideration provided by the stevedore were overcome by 'the commercial character' of the relationship between all the parties involved.

Lord Wilberforce said:

The whole contract is of a commercial character, involving service on one side, rates of payment on the other, and qualifying stipulations as to both. The relations of all parties to each other are commercial relations entered into for business reasons of ultimate profit.<sup>48</sup>

On the basis of the unilateral contract Lord Wilberforce was of the opinion that at the time of the main contract of carriage the consignor made an offer at large accepted by the stevedore only when the stevedore undertook the work. The performance of services by the stevedore in discharging the cargo was sufficient consideration to constitute a contract, even if the stevedore was already under an obligation to the carrier to perform those services. He then emphasised that the performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the stevedore should have the benefit of the exemptions and limitations contained in the bill of lading.<sup>49</sup>

Even though the *Eurymedon* was the first case in which a Commonwealth Court had allowed the stevedore, who was a third party, to claim the benefit of exemption clauses in the contract of carriage, it is considered that

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<sup>48</sup> [1974] All ER 1015 at 1019.

<sup>49</sup> *Id.*, at 1020 - 1021.

the application of the decision is not universal nor is it an exception to the rule.<sup>50</sup> It has been argued that the *Eurymedon* was an exceptional case because of the unusual fact that the stevedore had a very close relationship with the carrier. In fact the stevedore was the carrier's parent company, and the stevedore had seen the bill of lading before performing the work. The decision was not applied in *Philip Morris (Australia) Ltd. v. Transport Commission*<sup>51</sup> where the Tasmanian Supreme Court held that there was nothing in the principal contract of carriage to show that the carrier was acting, or was authorised to act, as agent for the subcontractor. However, there was no further discussion or argument of the problem.

In *Port Jackson Stevedoring Pty Ltd. v. Salmond & Spraggon (Australia) Pty Ltd.*, (the *New York Star*), the *Eurymedon*'s principles were applied, and the correctness of the decision was subsequently approved by the Privy Council. At first instance in the Supreme Court of New South Wales, the trial judge held that the stevedore had established that it was the agent of the carrier and entitled to rely on the exemption clauses. This decision was reversed by the New South Wales Court of Appeal on the ground that Lord Reid's fourth condition was not fulfilled, since the unloading and storing of goods by the stevedore, although done as a result of the agreement with the carrier and with knowledge of the terms of the bill of lading, were not done in response to the offer by the shippers. Thus, no consideration had been provided by the stevedores that could be referred to the shippers' agreement on exemption clauses.

The High Court of Australia also applied the *Eurymedon* and found that an agency relationship did exist between the stevedores and the carrier, and that consideration had passed from the stevedores to the consignee. However, the facts of this case were that the bill of lading ceased to have effect after the goods had been discharged over the ship's rail. As a result, the exemption clauses did not operate to protect the stevedores. The majority in the High Court were against extension of immunity after the goods had been discharged from the ship. Stephen J. stated:

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<sup>50</sup> Todd, *Modern Bills of Lading*, 221. Comment on the case see note 20 above.

<sup>51</sup> [1975] Tas. S.R. 128.

[T]he carrier's obligations under the bill of lading determine once and for all when, by discharge ex the ship's rails, the carrier effects due delivery of the goods. If the carrier's obligations under the bill determine on due delivery over the ship's rail, the relevant employment of the stevedore referred to in clause 2 will be co-extensive and the immunities conferred by that clause will also determine at that point.<sup>52</sup>

Barwick C. J. commented on the decision in *The Eurymedon* that:

[T]he event which gave rise to liability in the stevedore in the *Eurymedon* occurred before the ship's obligation to deliver had been performed. Thus the stevedore at the time of that event was excluding on behalf of the carrier part of the contract of carriage. Here (in the *New York Star*) the event giving rise to liability in the stevedore occurred after the carriage by the ship ... but before the consignee had obtained delivery of the consignment. Thus it can be properly said that their Lordship's decision related in terms only to the period of carriage. But their Lordship in expressing themselves did not use any language which would confine the principle of their decision to the activities of the stevedore up to the time the goods became free of the ship's tackle.<sup>53</sup>

He then gave his reasoning as follows:

To confine the scope of the agreement with the stevedore to a period ending with the discharge of the goods from ship's tackles is not only seriously to limit the efficacy of the clauses of the bills of lading and to defeat the reasonable commercial expectation of the consignor and carrier, but it is, in my opinion, an unwarranted interpretation of the language of the bill of lading. I am unable to discover why it should not cover the independent stevedore in the on movement of the cargo

Even though the High Court of Australia's decision in the *New York Star* restricted the operation of the *Eurymedon* only to the performance of the contract of carriage before the goods had been discharged, this decision was reversed when it was appealed to the Privy Council.

The Privy Council unanimously reaffirmed the correctness of the decision in the *Eurymedon* and also approved Barwick C. J.'s opinion. The Privy

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52 (1978) 18 A.L.R. 333 at 358.

53 *Id.*, at 350- 351.

Council was of the opinion that any stevedores employed by the carrier would normally come within the meaning of 'servant or agent of the carrier' in Clause 2 of the bill of lading. The normal situation was that stevedores had the benefit of any agreement between a carrier and the shipper, where it was understood that the carrier would employ stevedores to carry out work in relation to goods and where the intention was clearly expressed that the stevedores should benefit from the exemption clauses contained in the bill of lading.<sup>54</sup>

The argument that the protection of exemption clauses in the bill of lading should not be extended to the stevedores after the goods had passed the ship's rail was dealt with in the Privy Council decision that it was unreal to suggest that the carrier's obligations ended as soon as the goods were discharged, even though the bill of lading provided for the termination of the carrier's liability at that point. The Privy Council's view was that the bill of lading envisaged a continuing responsibility for the goods and the carrier operating in accordance with those terms, and it recognised the usual commercial practice by which the stevedores take delivery of the goods, storing them until the consignee arrived to take them. If the carrier itself acted as a stevedore, its liability would be determined by the terms of the bill of lading. Since stevedores were employed and made a party to the bill of lading their liability had been similarly governed.

### **Developments Since *the New York Star***

Since the Privy Council pronounced the decision in the *New York Star* in 1980 this decision has been applied in a number of cases. It was applied by the Court of Appeal of New South Wales in *Godina v. Patrick Operations Pty Ltd*<sup>55</sup> in which the same point was argued whether a stevedore was entitled to the benefit of a Himalaya clause. The decision was upheld in

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<sup>54</sup> [1980] 2 Lloyd's Rep 317 at 321.

<sup>55</sup> [1984] Lloyd's Rep 333.

*Broken Hill Proprietary Co Ltd v. Hapag-Lloyd Aktiengesellschaft*<sup>56</sup> and *Sidney Cook Ltd v. Hapag-Lloyd Aktiengesellschaft*.<sup>57</sup>

The principles in the *New York Star* decision, that allowed the exemption of stevedores under a bill of lading, were also transferred to contracts of carriage by land which incorporated a Himalaya clause in *Life Savers (Australasia) Ltd v. Frigmobile Pty Ltd*<sup>58</sup> and *Celthene Pty Ltd v. W. K. J. Hauliers Pty Ltd*.<sup>59</sup>

In the *Broken Hill Proprietary Co Ltd* case a carrier's agent damaged goods in transit due to negligence. Clauses 4 (1) of the bill of lading provided that the carrier should be entitled to sub-contract the carriage, and Clause 4 (2) stipulated that there should be no claims made against any party by whom any part of the carriage was performed other than the carrier.

#### Subcontracting and Indemnity

- 4 (1) The carrier shall be entitled to subcontract on any terms the whole or any part of the carriage.
- 4 (2) The merchant [that is, the cargo interests] undertakes that no claim or allegation shall be made against any person whomsoever by whom the carriage or any part of the carriage is performed or undertaken (other than the carrier) ... and if any such claim or allegation should nevertheless be made to indemnify the carrier against all consequences thereof. Without prejudice to the foregoing every such person shall have the benefit of all provisions herein benefiting the carrier and if such provisions were expressly for his benefit; and in entering into this contract, the carrier, to the extent of these provisions, does so not only on his own behalf but also as agent and trustee for such persons.

Broken Hill Proprietary Co. Ltd., the consignee, sued both the carrier and agent for damages. In the Supreme Court of New South Wales Yeldham J. stated that:

Some of the forgoing defences... raise squarely for consideration the application to this bill of lading, and to the circumstances of

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<sup>56</sup> [1980] 2 N.S.W.L.R. 572.

<sup>57</sup> [1980] 2 N.S.W.L.R. 588.

<sup>58</sup> [1983] 1 N.S.W.L.R. 431.

<sup>59</sup> [1981] 1 N.S.W.L.R. 606.

the present case, of principles enunciated in *New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co. Ltd.* and in *Port Jackson Stevedoring Pty Ltd. v. Salmond and Sparaggon*.<sup>60</sup>

Having indicated the relevance of the principle in both the *Eurymedon* and the *New York Star* to this case, Yeldham J. held that the carrier could subcontract his duties, by express terms in Clause 4 (1), and by doing so were able to transfer the indemnity in Clause 4 (2) to his agent, the third party. The exact terms of Clause 4 (2) of the bill of lading, which contained a promise that the cargo owner would not make a claim against the subcontractors, was given appropriate effect to prevent the cargo owner from pursuing a claim against the subcontractors.

In *Sidney Cook Ltd. v. Hapag-Lloyd Aktiengesellschaft*, Hapag-Lloyd entered into a contract of carriage with the sellers of certain goods to carry them from Hamburg to Sydney. The seller endorsed the bill of lading over to Sidney Cook Ltd., the purchaser. The goods were damaged whilst in the control of the agent of Hapag-Lloyd, after discharge from the vessel but before delivery to the consignee. The consignee sued Hapag-Lloyd and the agent for damages.

The bill of lading in this case contained a definition of 'carriage' which included the whole of the operation from receipt until delivery. It had also been stipulated that the carriage could be subcontracted and an indemnity to the subcontractor could be transferred, as it had been in Clause 4 (1) and (2) in the *Broken Hill Proprietary Co. Ltd.* case.

In the Supreme Court of New South Wales, Yeldham J. held that Clause 4 (1) was binding and that Clause 4 (2) of the bill of lading would not be limited in its operation only to the carriage by sea. He agreed with the reasoning of the Privy Council in the *New York Star* that a search for fine distinctions should not be made which would:

[C]onfine the contract of carriage to the mere sea leg of the entire operation and preclude a stevedore or person in the

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<sup>60</sup> [1980] 2 N.S.W.L.R. 572 at 577.

situation of a second defendant from receiving the benefit of a clause such as that presently under consideration.<sup>61</sup>

Accordingly, Yeldham J. rejected the argument put forward by the plaintiffs that the proper construction of the clause only applied to the carriage by sea and did not apply to the defendant who handled the goods after its discharge from the vessel. The Supreme Court of New South Wales, as in the *Broken Hill Proprietary Co. Ltd.* case, stayed the action against the defendant and gave him the benefit of Clause 4 (2).

In *Celthene Pty Ltd v. W. K. J. Hauliers Pty Ltd.*<sup>62</sup> the Supreme Court of New South Wales applied the principles in the *Euryomedon* and the *New York Star* outside the carriage of goods by sea and held them to additionally apply to the carriage of goods by road. In this case it was decided that the subcontractor of a carrier was entitled to the protection of exemption clauses contained in a consignment note which had clauses under which the carrier could subcontract the carriage, and that the carrier would not be liable in tort or contract or otherwise for any loss or damage to the goods carried whether caused by the carrier or others. The decision was upheld in the same court decision in *Life Savers (Australasia) Ltd v. Frigmobile Pty Ltd.*<sup>63</sup>

When the *New York Star* was decided the High Court of Australia was bound by the decision of the Privy Council. This is no longer so and it is clearly open to the High Court to decide, if persuaded by appropriate submissions to do so, that it should no longer follow the decision of the Privy Council on the ground that the decision was inappropriate to Australian conditions.<sup>64</sup> However, since the *New York Star* decision it appears that the Australian courts have accepted and applied the Privy Council decision in subsequent cases as discussed above. The recent decision of the High Court of Australia in *Nissho Iwai Australia Ltd v.*

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<sup>61</sup> [1980] 2 N.S.W.L.R. 588 at 596.

<sup>62</sup> [1981] 1 N.S.W.L.R. 588.

<sup>63</sup> [1983] 1 N.S.W.L.R. 431.

<sup>64</sup> See D. Malcolm, 'The Negligent Pilot and the Himalaya Clause: A Saga of Disagreement' 67 (1993) A. L. J. 14.

*Malaysian International Shipping Corporation Berhad*<sup>65</sup> followed the Privy Council decision in the *New York Star*; however the decision stated that:

In conclusion, we should mention that the Court granted special leave to appeal in this case because it was thought that the policy considerations referred to by Stephen and Murphy JJ. in *Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Australia) Pty Ltd* would arise for examination ....<sup>66</sup>

It has been considered that the High Court may have passed up an opportunity to examine once again the policy considerations referred to by Stephen and Murphy JJ. which the court was prepared to re-examine in the *Nissho Iwai* case, and it seems that the fundamental disagreements between the Court of Appeal of New Zealand (the *Eurymedon*) and the High Court of Australia (the *New York Star*), on one hand, and the Privy Council, on the other, remain unresolved.

### **The Effect of International Conventions**

In relation to third party liability there are relevant provisions in the amended Hague Rules and the Hamburg Rules. Article IV, Bis, Rule 2 of the amended Hague Rules provides, in relation to causes of action against the carrier, that:

If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor) such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.

The Hamburg Rules provide in Article 7, Rule 2 that:

If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

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<sup>65</sup> (1988) 167 C.L.R. 219.

<sup>66</sup> *Id.*, at 231.

It should be noted that both Articles of the two conventions are applicable only to a servant or agent of the carrier, not including independent contractors. Therefore, it seems that these provisions do not provide a suitable solution for independent contractors, such as a stevedoring company, who are not considered as an agent of the carrier. Thus, third parties can not rely on these provisions in order to claim protection from exemption clauses in the bill of lading.

### Conclusions

The principal conclusion is that the third party's liability problem is one of the major difficulties associated with the use of bills of lading. The present situation is that, in contracts of carriage of goods by sea, subcontracting and transfer of indemnity to third parties, (which have been specifically appointed as agents to the carrier), is now acceptable under contractual arrangements. It is possible for the carrier and agents to obtain a promise that the cargo owner will not make a claim against them, as in Clause 4 (2) in *Broken Hill Proprietary Co. Ltd. v. Hapag-Lloyd Aktiengesellschaft* and in *Sidney Cook Ltd. v. Hapag-Lloyd Aktiengesellschaft*. The Himalaya clause need not refer only to servants or agents of the carrier or subcontractors, but also to any persons performing services covered by the definition of carriage. Thus, as long as no distinctions are sought to confine the contract of carriage, or the period of carriage is well defined<sup>67</sup>, the carrier and subcontractor may avoid liability for damage by express terms in the bill of lading.

There is an argument that the extension of protection to third parties under Himalaya clause provisions is dangerous because it neglects the proposition that it would only be fair and equitable for persons causing

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<sup>67</sup> For example, Clause 5 (B) (2) (a) in the bill of lading in *Sidney Cook Ltd. v Hapag-Lloyd Aktiengesellschaft* made reference to three stages in the carriage where damage was possible:  
'(A) from receipt of the goods until loading; (B) during the carriage by sea; and  
(C) from discharge until delivery ...'

damage to cargo to be held responsible. Having protection by exemption clauses in bills of lading, third parties may continue to be irresponsible in the course of their duties. However, it is clear that it would be commercially unreal to suggest that third parties, such as stevedores, are going to be negligent in their practices in a competitive environment, for the reason of having protection under exemption clauses, which have been designed so that the apportionment of the risk can be properly dictated by way of insurance.<sup>68</sup>

It is concluded further that the reason underlying the third party liability issue concerns the concept of commercial inconvenience, especially excessive expenditure on insurance.<sup>69</sup> Denying a third party's protection from the benefit of exclusion clauses in the contract of carriage means that both cargo owner and the third party, such as a stevedore, will be required to insure for the same risk. The cargo owner is required to insure because the cargo might be damaged either without fault on any person's part or by the carrier, who can claim a contractual immunity if the bill of lading so provides. The stevedore is required to insure because it might negligently damage the goods.

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<sup>68</sup> Livermore, *Exemption Clauses*, 205.

<sup>69</sup> N.E. Palmer, *Bailment*, p. 1607.

## CHAPTER V

### REFORM OF BILLS OF LADING LEGISLATION

#### Introduction

At international level, the relationship between parties to an international sale contract and a carriage contract is mainly governed by a bill of lading. As it is generally accepted, a bill of lading has three major functions. First, it is a receipt for the goods by the carrier. Second, it is a document of title to the goods, and third the bill of lading contains or evidences terms of the contract of carriage. Thus, the bill of lading is the key function in all relationships between parties involved in the carriage of goods by sea. In particular, the bill of lading is important to the relationship between the carrier and the consignee of the goods named in the bill of lading or the endorsee of the bill, normally the buyer of the goods. This particular relationship arises by provisions in bills of lading legislation since normally the buyer of the goods is not privy to the contract of carriage between the shipper and the carrier.

The *Bills of Lading Act 1855* (U.K.), which was replaced by the *Carriage of Goods by Sea Act 1992* (U.K.), was the first legislation enacted to solve the problem of privity of contract. Before the 1855 Act, the shipper's rights in the contract of carriage were not passed to the consignee by a transfer of the bill of lading since the consignee was not a party to the contract of carriage. Section 1 of the *Bills of Lading Act 1855* provided that the consignee of goods named in a bill of lading and the endorsee of a bill of lading to whom the property in the goods shall pass, upon or by reason of such consignment or endorsement, shall have transferred all rights of action and liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

The *Bills of Lading Act 1855* (U.K.) having been in existence for more than 130 years, was not able to deal with recent problems arising from

developments in sea transportation. For instance, a question of interpretation arose over the unclear wording of Section 1 of the Act, which provided a transfer of contractual rights and liabilities to the consignee or endorsee, as to whether the consignee or endorsee must have property in the goods upon or by reason of consignment or indorsement of a bill of lading.<sup>1</sup> There was also another difficulty arising from limitations provided in the Act; that the Act applied only to bills of lading and not to other types of documents such as sea waybills or ship's delivery orders. Therefore, the *Carriage of Goods by Sea Act 1992* (U.K.) was enacted to replace the 1855 Act in order to solve problems created by the old Act and update bills of lading legislation to meet commercial needs.

This chapter examines the development and provisions of the *Carriage of Goods by Sea Act 1992* (U.K.) since it is the most recent change of law which intend to solve the problems under the old Bills of Lading Act. It also examines Australian bills of lading legislation because similar provisions to those in the *Bills of Lading Act 1855* (U.K.) were enacted in Australian legislation. The examination in this chapter focuses on proposals for reform of Australian bills of lading legislation.

### The Carriage of Goods by Sea Act 1992 (U.K.)

The *Carriage of Goods by Sea Act 1992*<sup>2</sup> came into force in the U.K. on July 16, 1992, following Royal Assent. Before this the Law Commissions (of

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<sup>1</sup> See Chapter II Part II for details of problems in bills of lading legislation.

<sup>2</sup> For comments on the *Carriage of Goods by Sea Act 1992* (U.K.) see generally: *Right of Suit in Respect of Carriage of Goods by Sea*, English and Scottish Law Commission, (Law Com. No. 196, Scot Law Com. No. 130), (London, 1991); T. K. Sing, 'Conflict of Laws implications of the Carriage of Goods by Sea Act 1992' [1994] L.M.C.L.Q. 280; T. Howard, 'The Carriage of Goods by Sea Act 1992' (1993) 24 J. Mar. L. & Com. 181; R. Bradgate and F. White, *The Carriage of Goods by Sea Act 1992*, (1993) 56 Mod. L. Rev. 188; F. M. B. Reynolds, 'The Carriage of Goods by Sea Act 1992' [1993] L.M.C.L.Q. 436; D. G. Powles (Editor), *Sea Transport: An Overview of the Implications of the Carriage of Goods by Sea Act 1992*, (1993) J. B. L. 61; D. G. Powles (Editor), *Transport (Sea): The Gudermes. What future for Brandt v. Liverpool?*, (1994) J. B. L. 62; C. Debattista, *UK Carriage of Goods by Sea Act 1992: Goodbye to Title to Sue Problems, or is it?*, A lecture delivered at the MLAANZ 19th AGM and

England and Scotland)<sup>3</sup> had considered that the *Bills of Lading Act 1855* (U.K.) no longer dealt effectively with the problems in international carriage of goods by sea. In particular, a major problem occurred when goods were lost or damaged during carriage and the consignee or endorsee of a bill of lading could not sue the carrier. This was considered to create disadvantages to the shipping and insurance industries since it was considered that these problems were better dealt with by other jurisdictions. The United States and some European states, for example, allow the lawful holder of a bill of lading to sue the carrier in contract for loss or damage to the goods covered by the bill regardless of whether property in the goods passes upon or by reason of the consignment or endorsement.<sup>4</sup>

In recognition of these problems, the Law Commissions proposed a policy to reform the 1855 Act in order to satisfy commercial needs and also to take the law in the same direction as internationally recognised rules relating to bills of lading. A summary of the recommendations of the English Law Commissions are as follows:

- (1) The lawful holder of a bill of lading should be entitled to assert contractual rights against the carrier, irrespective of the passing of property and regardless of whether he has suffered loss himself, if necessary being able to recover substantial damages for the benefit of the person who has suffered the loss.
- (2) The shipper and any intermediate holder of a bill of lading should not be entitled to rights of suit after someone else has become the lawful holder of the bill of lading.
- (3) A bill of lading should be capable of indorsement so as to pass contractual rights even after delivery of the goods has been

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Conference, 29th (Hong Kong, October 1992); Attorney-General's Department of Australia, *Revised Discussion Paper: Proposals for Reform of Australian Bills of Lading Legislation*, (June 1994) [This work is cited hereafter as *Discussion Paper*].

<sup>3</sup> *Right of Suit in Respect of Carriage of Goods by Sea*, Law Commissions of England and Scotland, (Law Com. No. 196, Scot Law Com. No. 130), (London, 1991) following the Law Commission Working Paper No. 112, *Rights of Goods in Bulk*, and Scottish Law Commission Discussion Paper No. 83, *Section 16 of the Sale of Goods Act 1979 and Section 1 of the Bills of Lading Act 1855*.

<sup>4</sup> The Law Commission's Working Paper No. 112, para 2.21-2.22.

made, providing that the indorsement is effected in pursuance of arrangements made before the delivery of the goods.

(4) Where the holder of a bill of lading, or any other person entitled to sue under our recommendations, takes or demands delivery of the goods, or otherwise makes a claim under the contract of carriage against the carrier, he should become subject to any contractual liabilities as if he had been a party to the contract of carriage, without prejudice to the liabilities under the contract of carriage of the original shipper.

(5) The rule in *Grant v. Norway* should be abolished. A bill of lading, representing goods to have been shipped or received for shipment and in the hands of the lawful holder, should be conclusive evidence against the carrier of such shipment or receipt.

(6) The consignee named in a sea waybill, or such other person to whom the carrier is duly instructed to deliver under the terms of the sea waybill, should be able to sue on the contract of carriage, without prejudice to the rights of the original shipper.

(7) The person entitled to delivery in accordance with an undertaking contained in a ship's delivery order should be able to assert contractual rights against the carrier on the terms of the undertaking.

(8) The Secretary of State should be empowered to make provision by regulations for information given by means other than in writing to be of equivalent force and effect as if it had been given in writing.<sup>5</sup>

As a result of the Law Commission's work the *Carriage of Goods by Sea Act 1992* (U.K.) was enacted and came into force in England, Wales, Scotland and Northern Ireland in July 1992. Some commentators consider that English maritime law should have been improved by the new Act. They also point out, however, that the Act could not overcome all the problems in commercial practices and that it may also create its own difficulties.<sup>6</sup> The major developments in the new Act are in the following areas:

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<sup>5</sup> *Id.*, at para 7.1.

<sup>6</sup> Comments on the *Carriage of Goods by Sea Act 1992* (UK) see for example: R. Bradgate and F. White, 'The Carriage of Goods by Sea Act 1992' (1993) 56 *Mod. L. Rev.* 188; Debattista, *UK Carriage of Goods by Sea Act 1992*.

1. eliminating the link between the transfer of property and the transfer of contractual rights,
2. extending the principle of transfer of contractual rights to shipping documents other than bills of lading,
3. resolving the difficulties created by false statements in bills of lading, the decision in *Grant v. Norway*,<sup>7</sup> and
4. allowing regulations to be introduced to deal with the introduction of electronic alternatives to transport documents, 'Electronic Data Interchange (EDI)'.

It is, therefore, essential to examine these major changes in the British bills of lading legislation, and evaluate whether the new provisions will overcome existing problems.

#### **Transfer of Contractual Rights under the *Carriage of Goods by Sea Act 1992* (U.K.)**

The *Carriage of Goods by Sea Act 1992* (U.K.) eliminates the problems of the *Bills of Lading Act 1855* (U.K.) by breaking the link between the transfer of contractual rights and the passing of property in the goods shipped under a bill of lading. There will no longer be problems as resulted from Section 1 of the 1855 Act; that the shipper's contractual rights and liabilities will pass to the consignee or endorsee only if property in the goods passes 'upon or by reason of the consignment or indorsement'. Section 1 of the 1855 Act provided:

Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of action, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

A number of practical problems occurred in cases where property in the goods did not pass to the buyer at all or passed either before or after

<sup>7</sup> (1851) 10 C.B. 665.

consignment or endorsement. These problems happened in cases such as *The Aramis*<sup>8</sup> where there was no delivery to the buyer and so no passing of property, and in *The Aliakmon*<sup>9</sup> where property did not pass because of a reservation of the right of disposal. In *The Delfini*<sup>10</sup> delivery was completed before the relevant indorsements of bills of lading took place and so there was no transfer of contractual rights to the indorsee.

It should be noted that although there was a wider interpretation of Section 1 that rights of suit would be transferred even where property did not pass upon or by reason of the consignment or indorsement<sup>11</sup>, this view was not accepted and it was rejected by the English Court of Appeal in *The Delfini*.<sup>12</sup>

In the 1992 Act the lawful holder of a bill of lading, or other person as provided in the Act, can sue the carrier in contract for loss or damage to the goods no matter whether the property in the goods passes upon or by reason of the consignment or indorsement or not. As the Act provides:

2. (1) Subject to the following provisions of this section, a person who becomes —
  - (a) the lawful holder of a bill of lading;

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.<sup>13</sup>

Therefore, this section separates the transfer of the contractual rights from the consignor to the consignee or indorsee of a bill of lading and the passing of the property in the goods. This will give benefit to the consignee, normally the buyer of the goods, or the indorsee of a bill of lading who receives the bill of lading. However, the property in the goods

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<sup>8</sup> [1989] 1 Lloyd's Rep. 213.

<sup>9</sup> [1986] A.C. 785.

<sup>10</sup> [1990] 1 Lloyd's Rep. 252.

<sup>11</sup> *Carver's Carriage by Sea*, (13th ed., 1982 by R. Colinvaux).

<sup>12</sup> [1990] 1 Lloyd's Rep. 252, at 261 *per Purchas L.J.*.

<sup>13</sup> Section 2 of the *Carriage of Goods by Sea Act 1992* (UK).

passes to him at some other time, for example, in circumstances such as in *The Delfini* and in cases concerning sales of unascertained bulk cargo.

In addition to the provision in Section 2 above, Section 5 (4) provides that rights of suit are still transferred by Section 2 notwithstanding that the goods have ceased to exist after issue of the relevant document or where the goods cannot be identified, for example the goods are unascertained bulk cargo. Section 5 (4) provides as follows:

(4) Without prejudice to Sections 2 (2) and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which a document relates -

- (a) cease to exist after the issue of the document; or
  - (b) cannot be identified (whether because they are mixed with other goods or for any other reason);
- and references in this Act to the goods to which a document relates shall be construed accordingly.

A major consequence of the separation of contractual rights from the passing of property is a question concerning liabilities under the contract of carriage; that is, whether the holder of a bill of lading should be liable to the carrier in respect of obligations under the contract of carriage. Under the *Bills of Lading Act 1855* (U.K.) the consignee or indorsee who has rights of suit is also subject to liabilities in respect of the goods. However, Section 1 of the Act did not appear to cover all liabilities of the shipper. It was considered that the consignee or indorsee should only be liable to the carrier in respect of obligations arising after the goods have been shipped or the bill of lading indorsed<sup>14</sup>.

This question was examined in the Law Commission's Working Paper as there were proposals to extend rights of suit regardless of the passing of property, so it was necessary to make a reconsideration of the link between rights and liabilities.<sup>15</sup> There would be commercial difficulties if the shipper's rights and liabilities transferred to all holders of bills of lading. For example, banks who held bills of lading as security would be liable for

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<sup>14</sup> Scrutton on Charterparties (19th ed., 1984), .28, and , *Carver's Carriage by Sea*, 68.

<sup>15</sup> The Law Commission's Working Paper No. 112, Part 3 at 23.

freight, demurrage and other charges, which was not part of the commercial risk undertaken by a bank.

There were several arguments against and in favour of the bill of lading holder being subject to contractual liabilities.<sup>16</sup> However, the Law Commission made a recommendation that contractual liabilities are not to be automatically imposed on every holder of a bill of lading. It is not desirable that liabilities could be enforced against the person who merely holds the bill of lading. Only the holder of the bill of lading who actually enforces any rights under the contract of carriage should be subject to the liabilities under the contract. As Section 3 of the *Carriage of Goods by Sea Act 1992* (U.K.) provides:

3. (1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection—

(a) take or demands delivery from the carrier of any of the goods to which the document relates;

(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or

(c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,

that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract. ...

Thus, it should be noted that under the 1992 Act not only the contractual rights were separated from the passing of property but also the liabilities under the carriage contract. This was designed to solve practical problems which could not be solved by the *Bills of Lading Act 1855*.

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<sup>16</sup> *Id.*, at 23-26.

## **Extension of the Principle of Transfer of Contractual Rights to Shipping Documents other than Bills of Lading**

As already noted, one of the major problems created by the *Bills of Lading Act 1855* (U.K.) was that the Act applied only to bills of lading and not to other types of shipping documents. This limitation caused difficulties to buyers of the goods who hold a document other than a bill of lading. Moreover, the Act itself did not define the meaning of 'bill of lading'. A bill of lading is usually identified by reference to its three functions; as a receipt for the goods, as an evidence of the contract of carriage, and as a document of title to the goods. In addition, because a bill of lading for the purposes of the Act must be a document of title, it must also be made transferable.

Thus, some kinds of shipping documents which have been developed and widely used by merchants are not bills of lading for the purposes of the Act. The consequence is that holders of such documents have no rights of suit against the carrier. At present documents other than bills of lading which are widely used in commercial practices are sea waybills and ship's delivery orders.

### **Sea Waybills**

A sea waybill is a document which contains or evidences an undertaking by the carrier to the shipper to deliver goods to the person who is identified by the shipper. A sea waybill is also a receipt for the goods, although it is not a document of title since it is not transferable. The sea waybill is normally used where a bill of lading is not necessary as security for payment or as document of title in order to re-sell the goods during carriage. Sea waybills have various names, for example, the so called 'straight' bills of lading in the U.S. which are similar to sea waybills, 'non-negotiable general sea waybill', or 'non-negotiable sea waybill straight bill of lading'.<sup>17</sup> Where a sea waybill is used it does not have to be transferred

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<sup>17</sup> C. Debattista, 'Sea Waybills and the Carriage of Goods by Sea Act 1971' [1989] L.M.C.L.Q. 403.

to the consignee. The shipper retains the sea waybill and he can vary his delivery order to the carrier at any time during carriage. For example, the shipper may direct the carrier to deliver the goods to a person other than the consignee named on the sea waybill.

Unlike a delivery under a bill of lading, which is normally made against the surrender of the bill of lading, a delivery under a sea waybill is made to the consignee named in the waybill upon acceptable proof of his identify. These are the main advantages of sea waybills, which make it more convenient for some particular trades than a bill of lading. However, the major disadvantage of a sea waybill is that it is a non-negotiable document and not a document of title, so it is not a bill of lading for the purposes of the *Bills of Lading Act 1855* (U.K.). Thus, the consignee cannot have transferred rights of suit against the carrier by virtue of Section 1.

*The Carriage of Goods by Sea Act 1992* (U.K.), therefore, extends its application to cover sea waybills and entitles the person to whom delivery under a sea waybill is to be made to have transferred all rights of suit under the contract of carriage as if he had been a party to that contract. Section 1 of the Act provides:

1. (1) This Act applies to the following documents, that is to say—
  - (a) any bill of lading;
  - (b) any sea waybill; and
  - (c) any ship's delivery order.

...

(3) References in this Act to a sea waybill are references to any document which is not a bill of lading but—
  - (a) is such a receipt for goods as contains or evidences a contract for carriage of goods by sea; and
  - (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract. ...

It should be noted that the person who is entitled to the rights of suit by virtue of this section is not limited to the consignee named in the sea waybill, but may include also the person to whom delivery of the goods is to be made by the carrier. This is because the shipper who uses a sea waybill as a shipping document normally retains the waybill and also

rights of disposal, and he can alter the delivery instructions during carriage.

### Ship's Delivery Orders

A ship's delivery order is defined by the Uniform Commercial Code<sup>18</sup> as a written order to deliver goods directed to a warehouseman, carrier or other person who in the ordinary course of business issues warehouse receipts or bills of lading. Thus, it may refer to an order by the owner of the goods to the person in possession, normally the carrier, to deliver them to the person named in the order. Like a sea waybill, a ship's delivery order is not a transferable document of title and its holder has no rights of suit against the carrier.

Ship's delivery orders are used in a number of trades where a seller wants to sell parts of a bulk cargo to different buyers while the goods are in transit. In this circumstance the seller may not give a bill of lading to each buyer since the bill covers all the goods shipped. The carrier, however, can issue separate bills of lading for different parts of an undifferentiated bulk.<sup>19</sup> However, transfer of the separate bills of lading could not pass property to the buyers because the different parcels were not yet ascertained for the purposes of the sale of goods legislation. Thus, a ship's delivery order is given to each of the buyers in respect of a part of the bulk cargo instead of a bill of lading. A ship's delivery order is designed to act like a 'mini' bill of lading but it is issued after shipment and is usually in respect of a smaller cargo.<sup>20</sup>

Even though the holder of a ship's delivery order may be in a good position since the carrier may give him the right to possession of the goods on presentation of the ship's delivery order or may undertake to deliver the goods to him or his order, the holder of a ship's delivery order still had no right to sue the carrier under Section 1 of the *Bills of Lading Act 1855*

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<sup>18</sup> Section 7 - 102(d) of the Uniform Commercial Code.

<sup>19</sup> See *The Aramis* [1989] 1 Lloyd's Rep 213.

<sup>20</sup> The Law Commission's Working Paper No. 196, para. 5.29.

(U.K.). Therefore, in order to protect the buyer of a part of bulk cargo who is only able to receive a ship's delivery order rather than a bill of lading, the *Carriage of Goods by Sea Act 1992* includes ship's delivery orders in its application. Under Section 2 (1) (c) the person to whom delivery of the goods is to be made shall have transferred to him all rights of suit against the carrier. This will make the holder of a ship's delivery order or other person who will take delivery in a better and similar position to the lawful holder of a bill of lading.

There is no doubt that sea waybills and ship's delivery orders will be more widely used when the consignee or the person who will take delivery entitled to sue the carrier under the contract of carriage. However, a further difficulty arises since the Act does not make it clear that some particular types of documents, for example, some combined transport documents, are included in the purposes of the Act.

### **Elimination of the Rule in *Grant v Norway***

The Rule in *Grant v Norway*<sup>21</sup> ('the rule') deals with false statements in a bill of lading. In that case it was held that a ship's master had no authority to sign bills of lading for goods which were not loaded on board the ship. The result of the rule is that if the ship's master signs a bill of lading for goods which are never shipped, the holder of the bill has no right of action against the carrier. This rule makes it inconvenient for shipping business since the ship's master is normally the one who knows whether the goods are shipped or not, and the consignee or endorsee relies on the correctness of statements made on the bill of lading.

The rule is only effectively overruled where the Hague-Visby Rules or the Hamburg Rules apply and a third party is involved. That is when the bill of lading is transferred to a third party, a consignee or indorsee, who acts in good faith.<sup>22</sup> Article 3 (4) of the Hague-Visby Rules provides that a bill of lading shall be *prima facie* evidence of the receipt by the carrier, but proof

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<sup>21</sup> (1851) 10 C.B. 665. See details of the case in Chapter II, at 42.

<sup>22</sup> Article 3(4) of the Hague-Visby Rules.

to the contrary shall not be admissible when the bill has been transferred to a third party acting in good faith. However, in cases where the Hague-Visby Rules are not applied the rule still causes difficulties to consignees.

The *Carriage of Goods by Sea Act 1992* (U.K.) makes it clear that a bill of lading represents goods that have been shipped or received for shipment, and that when it is in the hand of the lawful holder in good faith it is conclusive evidence of such shipment or receipt as against the carrier.<sup>23</sup> It should be noted, however, that the abolition of the rule in *Grant v. Norway* affects only bills of lading. This means that shipping documents other than bills of lading, such as sea waybills, straight bills of lading, or ship's delivery orders, are not conclusive evidence against the carrier. They are merely *prima facie* evidence of the receipt by the carrier of the goods described.

### **Provisions Relating to Electronic Data Interchange (EDI)**

The *Carriage of Goods by Sea Act 1992* (U.K.) has provisions which can extend the Act to apply to Electronic Data Interchange (EDI). This is because developments in communication technology have led to attempts to eliminate the transfer of paper documents, in particular paper bills of lading. An electronic data interchange system has been introduced for use as paperless or electronic bills of lading in order to solve some problems concerning paper documents, such as delay in transfer of bills of lading from one country to another. At present, there are both technical and legal problems associated with EDI and it is still not common practice in international trade to use an EDI system as electronic bills of lading.<sup>24</sup>

Therefore, the *Carriage of Goods by Sea Act 1992* (U.K.) is applicable also to documents forming part of an electronic record (if they become common in the future), by allowing the Secretary of State to make provision for information given by means other than in writing. This will be equivalent

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<sup>23</sup> See Section 4 of the the *Carriage of Goods by Sea Act 1992* (UK).

<sup>24</sup> See Chapter II and Chapter VI.

and effective as if it had been given in a written document.<sup>25</sup> That is to say, the Act may apply to electronic systems operating as paper bills of lading.

### Bills of Lading Legislation in Australia

The major problems concerning bills of lading legislation in Australia are similar to those created by the *Bills of Lading Act 1855* (U.K.).<sup>26</sup> An example is found in section 1 of the *Bills of Lading Act 1857* (Tas):

1. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of action, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

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<sup>25</sup> Section 1(5)-(6) of the *Carriage of Goods by Sea Act 1992* (UK).

- (5) The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to—  
(a) the issue of a document to which this Act applies;  
(b) the indorsement, delivery or other transfer of such document; or  
(c) the doing of anything else in relation to such a document.

- (6) Regulations under subsection (5) above may—  
(a) make such modifications of the following provisions of this Act as the Secretary of State considers appropriate in connection with the application of this Act to any case mentioned in that subsection; and  
(b) contain supplemental, incidental, consequential and transitional provision;

and the power to make regulations under that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

<sup>26</sup> Before the legislative reform of bills of lading in 1997-1998, the Australian States and Territories had provisions corresponding to Section 1 of the English *Bills of Lading Act 1855*:

New South Wales	- <i>The Sale of Goods Act 1923</i> , Section 50 A
Queensland	- <i>The Mercantile Acts 1867</i> , Section 5
South Australia	- <i>The Mercantile Law Act 1936</i> , Section 14
Tasmania	- <i>The Bills of Lading Act 1857</i> , Section 1
Victoria	- <i>The Goods Act 1958</i> , Section 73
Western Australia	- by ordinance an Act to Amend the Law relating to Bills of Lading, 20 Vic No 7 (WA)
Northern Territory	- <i>The Bills of Lading Act 1859</i> (SA), adopted by section 7 of the <i>Northern Territory Acceptance Act 1910</i> (Cth).

This provision established the crucial link between the transfer of contractual rights and the time when property in the goods passes from consignors to consignees. According to the wording of this section the transfer of a shipper's rights and liabilities occurs only when property passes upon or by reason of the consignment or endorsement of the bill of lading. This leads to an argument as to whether the passing of property in the goods must happen at the same time as the transfer of the bill of lading.<sup>27</sup> The question of the interpretation of this provision is critical to the operation of the bills of lading legislation and causes difficulty in circumstances where the property does not pass to the consignee or endorsee. For example, in cases where contracts of carriage involve unascertained bulk cargo or where the property passes at some other time than the transfer of the bill of lading.

The most crucial difficulty caused by this provision is the right of the consignee or endorsee of the bill of lading to sue the carrier in cases where the goods are lost or damaged by the carrier. There have been a number of cases illustrating this difficulty. In *The Aliakmon*<sup>28</sup>, for example, it was held that the property in the goods did not pass to the buyers upon or by reason of the endorsement of the bill of lading. In this case the contract between the buyer and the seller was unusual since the parties made an agreement that property in the goods still remained with the seller and the buyer held the bill of lading as the seller's agent. The result of this case was that the consignee of the goods, who suffered from the carrier's negligence, could not sue the carrier.

A similar problem occurred in the case of unascertained bulk cargo, as in *The Aramis*.<sup>29</sup> This is because property in the unascertained goods cannot pass to the buyer until they have been ascertained. Provisions in the sale of goods legislation prevent the passing of property before the goods have been ascertained. For example, Section 21 of the *Sale of Goods Act 1923* (NSW) provides as follows:

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<sup>27</sup> For details of interpretation of Section 1 see Chapter IV above.

<sup>28</sup> [1986] A.C. 785.

<sup>29</sup> [1989] 1 Lloyd's Rep. 213.

Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.<sup>30</sup>

An ascertainment of bulk cargo generally cannot happen until discharge of the goods from the ship and the goods are separated out according to the details on the bill of lading. Therefore, in this case the property in the goods will not transfer to the buyer even when the buyer has already received the bill of lading. As a result, if the goods are lost or damaged by the carrier or his servants, the buyer can recover neither from the carrier nor the seller.

The difficulty concerning the interpretation of the bills of lading legislation, in particular the similar provisions to Section 1 of the *Bill of Lading Act 1855* (U.K.), prevents the buyer of the goods being able to bring an action against the carrier. This is because the buyer is not a party to the contract of carriage between the seller and the carrier, so the buyer is not entitled to sue the carrier in contract. Moreover, since the buyer has no property in the goods, he is not entitled to sue the carrier in tort for negligence.

### Proposals for Reform of Australian Bills of Lading Legislation

The difficulties associated with the Australian bills of lading legislation, in particular the limitation of title to sue in contract of carriage, were raised by the Maritime Law Association of Australia and New Zealand (MLAANZ) in 1992. The MLAANZ expressed its concern about this problem to the Commonwealth Attorney-General and the Commonwealth Minister for Transport and Communications. The Commonwealth Attorney-General's Department and the Department of Transport and Communications (now the Department of Transport)

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<sup>30</sup> The similar provisions in other States and Territory legislation are as follows: *Sale of Goods Act 1972* (NT), section 21; *Sale of Goods Act 1895* (SA), section 16; *Sale of Goods Act 1896* (TAS), section 21; *Goods Act 1958* (Vic), section 21; *Sale of Goods Act 1895* (WA), section 16; *Sale of Goods Act 1896* (Qld), section 16.

agreed to proceed with the preparation of a Discussion Paper on the title to sue question and connected matters.

In August 1993 the Commonwealth Attorney-General's Department published a draft Discussion Paper relating to bills of lading legislation. The Discussion Paper examined current law on bills of lading regarding the following;

1. title to sue in contract of carriage,
2. the use of sea waybills and other non-negotiable instruments,
3. the need to provide for electronic bills of lading, and
4. options to reform bills of lading legislation.

A draft of the Discussion Paper was forwarded to all relevant State and Territory ministers and the industry and professional groups in order to obtain comments on the text and recommendations for reforms. In June 1994 the revised version of the Paper was published after all comments received in response to the draft had been considered. As a result of these efforts, the Australian Federal Government introduced the model bills of lading legislation, the draft Sea-Carriage Documents Bill, in 1996 for States and Territories to use as a model to reform their legislation. It is, therefore, essential to examine the discussions and recommendations set out in the Discussion Paper together with the provisions of the Sea-Carriage Documents Bill.

### **Title to Sue in Contract of Carriage**

It is suggested in the Discussion Paper that States and Territories should consider amending their bills of lading legislation with a uniform approach, that is, the Australian bills of lading legislation should be amended to allow the transfer of contractual rights from the shipper to the lawful holder of a bill of lading but that such transfer should occur irrespective of whether property in the goods passes upon or by reason of the consignment or indorsement.<sup>31</sup>

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<sup>31</sup> *Discussion Paper*, 15.

Problems of title to sue in Australia is similar to those in the English jurisdiction. The crucial link between the transfer of contractual rights from the consignor to consignee and the time when property in the goods passes makes it difficult for the consignee or indorsee to sue the carrier in breach of contract of carriage. The consignee or indorsee who has no property in the goods upon or by reason of consignment or indorsement, as in *the Aliakmon*<sup>32</sup>, *the Delfini*<sup>33</sup> or *the Aramis*<sup>34</sup>, will have no chance to sue the carrier if the goods are lost or damaged by the carrier. Even though it is possible for the consignee or indorsee to recover damages from the carrier, (for example, by assignment of contractual rights from the seller to the buyer, by implied contract, or remedies in tort) it is more likely that the consignee will be faced with more difficulties than if he had the contractual rights transferred to him.

Therefore, it is accepted that the Australian bills of lading legislation in relation to title to sue is in need of amendment. There are three possible approaches to reforming the legislation:

1. The first approach would be to amend the bills of lading legislation to allow the shipper's contractual rights to be transferred to the consignee or indorsee, in cases where the goods are unascertained, as if the goods are ascertained.
2. The second approach would be to allow the consignee or indorsee to sue and be sued regardless of whether the property in the goods passes to the consignee or indorsee.
3. The third approach would be to allow the transfer of contractual rights from the shipper to the lawful holder of a bill of lading but for such transfer to occur irrespective of whether property in the goods passes upon or by reason of the consignment or indorsement.<sup>35</sup>

The Attorney-General's Department recommends that the third approach should be adopted to the reform of the bills of lading legislation since this

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<sup>32</sup> [1986] A.C. 785.

<sup>33</sup> [1990] 1 Lloyd's Rep. 252.

<sup>34</sup> [1989] 1 Lloyd's Rep. 213.

<sup>35</sup> *Discussion Paper*, 13.

approach would solve difficulties as in *the Delfini* and the ascertainment of goods problems. It would be a relatively minor legislative change and would provide the greatest degree of clarity in the law.

### **Sea Waybills and other Non-Negotiable Instruments**

Since sea waybills are often used as an alternative to bills of lading in circumstances when a negotiable shipping document is not required, it has been suggested by a number of organisations that bills of lading legislation should cover sea waybills and other non-negotiable documents such as ship's delivery orders. This means that the principle purpose of reforming the bills of lading legislation, that is the transfer of contractual rights from the consignor to the consignee, should be applied to sea waybills. Like the lawful holder of a bill of lading, the consignee named in a sea waybill or the person to whom the carrier is instructed to deliver under the terms of the waybill, should have transferred all contractual rights under the contract of carriage.

Both sea waybills and ship's delivery orders are non-negotiable documents. They can serve as receipts for the goods and as evidence of contract of carriage, but they cannot transfer property in the goods. As a result, sea waybills and ship's delivery orders do not give the consignee or the person entitled to take delivery any right to sue the carrier for breach of the contract of carriage. This limits the benefit of the use of sea waybills and ship's delivery orders and places the consignee in an uncertain position. For example, it would weaken the position of the buyer of part of a bulk cargo who is able to receive only a ship's delivery order.

As a result, it is recommended that States and Territories should consider reform of the law pertaining to sea waybills and ship's delivery orders. Relevant bills of lading legislation should be amended to allow the transfer of contractual rights from the shipper to the consignee named in a sea waybill or such person to whom the carrier is duly instructed to deliver under the terms of the sea waybill. The same principle should apply to the person entitled to delivery in accordance with an undertaking contained in a ship's delivery order. However it should not, at this stage, be extended

to non-negotiable instruments other than sea waybills and ship's delivery orders. It is noted in the Discussion Paper that:

No logical reason exists why, if reform of the bills of lading legislation should occur in accordance with the recommendation of Part 1 (allow the lawful holder of a bill of lading to sue the carrier), such reform should not apply to sea waybills and other appropriate instruments. That sea waybills do not possess the characteristic of document of title does not seem to be sufficient reason for sea waybills to be excluded from any reform process.<sup>36</sup>

### **Electronic Data Interchange (EDI)**

The increasing use of new technology in international trade, in particular in the area of electronic data interchange (EDI) which can be used as electronic bills of lading (EBLs), is one of the major issues in the discussion to amend bills of lading legislation in Australia. Electronic data interchange is a computer to computer communication system in which information or trade documents may be transmitted. This kind of system has emerged in commercial practices. For example, in the area of banking transactions there are modern techniques, in particular electronic financial services or so-called 'Electronic Funds Transfers', which involve little or no paper documentation.<sup>37</sup> However, the use of an electronic data interchange system in the area of shipping documents as a bill of lading is still not common in practice, since it has a number of legal and practical difficulties.

At international level, there have been attempts to create general rules for electronic bills of lading in order to make them uniform and more effective in practice. The first attempt was the Rules for Electronic Bills of Lading adopted by the Comité Maritime International (CMI) in Paris in June 1990. The processes are described as follows:

The CMI rules operated by the carrier issuing to the shipper an EBL using electronic messages together with a private code or

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<sup>36</sup> *Id.*, at. 20.

<sup>37</sup> See J. W. Bridge *et al.*, (ed.) *United Kingdom Law in the mid-1990s* (Part 1), (1994) 371.

'key', possession of which entitles the holder to control the goods. This right of control is passed to other interests after notification by the shipper to the carrier who cancels the original key and gives a new key to the new person entitled to control of the goods. In this way the key holder should have the same rights as the bill of lading holder.<sup>38</sup>

In order to solve the problem of the requirement of a paper document, the CMI rules provide that all parties involved in the procedures agree that any national or local law, custom or practice requiring writing and signature is satisfied by the procedures, and that the defence that the contract is not in writing will not be raised.<sup>39</sup>

Another important attempt has been carried out by the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL is attempting to develop uniform international rules that would validate and encourage the use of EDI. In 1995, UNCITRAL adopted the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication.<sup>40</sup> The Model Law is intended to serve as a example to countries in order to create uniform law and practice involving the use of computerised systems in international trade. In June 1996, UNCITRAL adopted the 'Model Law on Electronic Commerce'<sup>41</sup> which has a specific part dealing with carriage of goods and transport documents.<sup>42</sup> The Model Law introduced method to overcome the legal problems of EDI, known as the 'functional equivalence approach'.<sup>43</sup> This was a major issue considered for reform of Australian bills of lading legislation.

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<sup>38</sup> See the CMI Rules for Electronic Bills of Lading (1990) and *Discussion Paper*, 25.

<sup>39</sup> Rule 11 of the CMI Rules.

<sup>40</sup> The text of the draft Model Law was published in the Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, (New York, 28 May-14 June 1996) (A/CN.9/421).

<sup>41</sup> Excerpt from Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session (New York, 28 May-14 June 1996) General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17).

<sup>42</sup> UNCITRAL Model Law on Electronic Commerce, Art. 16-17.

<sup>43</sup> See Chapter VI.

The use of an EDI system (as electronic bills of lading) and the relevant legal problems has been discussed in the proposals for reform of Australian bills of lading legislation. It is concluded that the major legal obstacles to the greater use of electronic bills of lading are these factors;

1. the requirement of a 'writing' or a 'document',
2. documents of title and negotiability,
3. signature and other authentication,
- 4 evidential value of EDI messages,
5. formation of contracts, and
6. communication<sup>44</sup>.

It is clear that the first three factors are very important to the qualification of the bill of lading under the Australian bills of lading legislation since the *Carriage of Goods by Sea Act 1991* (Cth) defines the term 'contract of carriage' as 'a contract of carriage covered by a bill of lading or any similar document of title'. Therefore, a shipping document which is similar to a bill of lading should be in a form of written document and also a negotiable document of title. It is noted that:

[T]he Australian bills of lading legislation probably only covers bills of lading in paper form in the sense of requiring them to be signed and in referring to indorsement. It seems questionable that either requirement would be regarded as being met by electronic methods without legislative changes.<sup>45</sup>

The other three problems associated with the use of EDI raise further legal problems if electronic bills of lading are used. There are questions as to whether EDI messages or electronic bills of lading can be accepted as evidence, whether it can be considered as a legal formation of contracts, and, who will bear the risk of a failure of error in EDI systems, especially where third parties are involved. The legal obstacles to the greater use of EDI as electronic bills of lading are discussed in Chapter VI below.

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<sup>44</sup> *Discussion Paper*, 27. For further discussion on EDI see Chapter VI below.

<sup>45</sup> *Id.*, at 28.

## The Approach of the United Kingdom Bills of Lading Legislation

It is suggested that Australia should follow the U.K. approach to reform bills of lading legislation.<sup>46</sup> Further comments may also be made upon the English *Carriage of Goods by Sea Act 1992* and its relationship to options of reforming the Australian bills of lading legislation. Debattista<sup>47</sup> notes that it is clear that there has been less litigation on the Australian bills of lading legislation than the U.K. *Bills of Lading Act 1855*. There are reasons for this:

1. There is a wider interpretation of the term 'upon or by reason of' in Section 1 of the Act.
2. The doctrine of privity of contract may receive rather shorter shrift or it is less restrictively applied.
3. There is a possibility in Australia for the consignee to be able to sue the carrier in tort for economic loss.

He comments further that receivers of damaged or short-delivered cargo claiming in Australia would continue to sue in contract where a less restrictive interpretation of the doctrine of privity of contract allows them to, or in tort where this affords them a tactical advantage over contract. He concludes that the U.K. approach might be inappropriate for Australian bills of lading legislation. The reasons are as follows:

- a) With the wording of the 1855 Act still in place, it will always remain possible for judges in foreign jurisdictions to adopt the restrictive interpretation illustrated in England by the decision in *the Delfini*.

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<sup>46</sup> *Id.*, at 47. The Discussion Paper recommended that:

Australia should consider following the U.K. approach of building on the current legal system rather than attempting to introduce any untried and uncertain legal regimes in the areas of bills of lading legislation and associated legal issues.

The U.K. approach as used in the *Carriage of Goods by Sea Act 1992* (U.K.) should generally be followed in Australia and improved upon with additional provisions providing that where a carrier issues a document, being a bill of lading, to evidence the receipt of goods carried, that document is *prima facie* evidence of the taking over, by the carrier, of the goods as therein described.

<sup>47</sup> Debattista, *UK Carriage of Goods by Sea Act 1992: Goodbye to Title to Sue Problems, or is it?*, 230.

b) Title to sue in contract may still be important to a plaintiff who finds it difficult to prove a direct causal link between a specific act of negligence and a specific loss.

c) Since the coming into force of the Hague-Visby Rules in Australia through the *Carriage of Goods by Sea Act 1991*, any tactical advantage which an action in tort might have had over one in contract will vanish, given the effect of Article 4 bis 1 of the Rules. In terms of that article, the carrier can plead the defences and limits to liability set out in the Rules whether the cargo claim is brought in contract or in tort. ...<sup>48</sup>

However, there are strong arguments on this issue:<sup>49</sup>

1. even though Australian maritime case law evidences less difficulty with title to sue problems, there is no reason why the problems arising in the English cases could not arise in Australian cases

2. there is no evidence that provisions similar to Section 1 of the *Bills of Lading Act 1855* (U.K.) would be more widely interpreted in Australia and the doctrine of privity of contract still remains a rigidly enforced principle of contract law, and

3. on the issue of the possibility of the Australian cargo claimant being able to recover in tort action against the carrier, it is argued that it remains more difficult for the plaintiff.

It is suggested, therefore, that the Australian bills of lading legislation should be amended in a similar way to the U.K. approach in the *Carriage of Goods by Sea Act 1992* in order to avoid problems caused by provisions similar to Section 1 of the *Bills of Lading Act 1855*.

### The Sea-Carriage Documents Acts (1997-1998)

As already noted, the Australian Federal Government introduced the Sea-Carriage Documents Bill in 1996 to serve as a model law for States and Territories to reform their bills of lading legislation. As a result, four States have enacted the new legislation. New South Wales and Western

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<sup>48</sup> *Id.*, at 234.

<sup>49</sup> See M. Thomson, 'Title to Sue on Oversea Contracts of Sea Carriage: the Need for Reform in Australia' (1994) 10 MLAANZ Journal, 33.

Australia enacted the Sea-Carriage Documents Acts in 1997, followed by South Australia and Victoria in 1998.

The Sea-Carriage Documents Acts ('the Acts') are divided into four parts which cover: general provisions; rights under contracts of carriage, liabilities under contracts of carriage; and evidence. The Acts introduce the term 'Sea-Carriage Document' to bring in a wider scope of application, including: bills of lading, sea waybills, and ship's delivery orders.<sup>50</sup> They also set out a clear definition of 'lawful holder', meaning a person who has come into possession of the bill of lading in good faith as the consignee of the goods, or as the result of the completion of any endorsement or other transfer of the bill.<sup>51</sup>

The Acts take the similar approach to the *Carriage of Goods by Sea Act 1992* (U.K.) by linking the contract of carriage almost inseparably to the lawful holder of the bill of lading, which reduces uncertainty as to the rights and liabilities under contracts of carriage. Under section 8 (1)-(2) of the *Sea-Carriage Documents Act 1997* (NSW),<sup>52</sup> all rights under the contract of carriage are given and transferred to the lawful holder of a sea-carriage document. As a result, when a person passes over the bill of lading, the rights of suit under the contract of carriage are transferred to and vested in the recipient even if the passing of the bill occurs later than the transfer of the property in the goods.

However, the Australian Sea-Carriage Documents Acts do not follow the English *Carriage of Goods by Sea Act* without modification. In fact, they

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50 See for example, the *Sea-Carriage Documents Act 1997* (NSW), Sec. 5.

51 Sec. 5 of the *Sea-Carriage Documents Act 1997* (NSW)

lawful holder, in relation to a bill of lading, means a person who:

(a) has come into possession of the bill, in good faith, as the consignee of the

goods, by virtue of being identified in the bill, or

(b) has come into possession of the bill, in good faith, as a result of the completion, by delivery of the bill:

(i) of any endorsement of the bill, or

(ii) in the case of a bearer bill—of any other transfer of the bill, or

(c) would be the lawful holder of the bill under paragraph (a) or (b) had not the person come into possession of the bill as the result of a transaction effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods.

52 The *Sea-Carriage Documents Act 1997* (NSW) Sec. 8 (1), (2).

have a different structure from the U.K. Act and also provide some additional provisions. For example, the Acts provide for the extinguishment of previous rights – where section 8 operates to transfer rights under the contract of carriage, the transfer extinguishes any entitlement to those rights which derives from a person's having been an original party to the contract. The Acts also have provisions on liability of original parties to the contract of carriage and evidential value of bills of lading.<sup>53</sup>

Moreover, the Acts differ from the *Carriage of Goods by Sea Act 1992* in that they take a different approach to deal with electronic data interchange. They use the term 'data message' and define its meaning according to the UNCITRAL Model Law on Electronic Commerce. The Acts follows the Model Law by providing necessary provisions on 'electronic and computerised sea-carriage documents', in that they apply to sea-carriage documents in the form of a data message in the same way as they apply to written sea-carriage documents.<sup>54</sup>

### Conclusions

The conclusion is that, the reform of English bills of lading legislation by the *Carriage of Goods by Sea Act 1992* makes radical changes to the rules governing actions against carriers by consignees and endorsees on bills of lading. As discussed above, the Act not only improves the position of title to sue problems, but also had a strong influence on the considerations of whether to reform Australian bills of lading legislation. Moreover, the Act appears to apply in another independent country, Singapore, given its own motion by virtue of the Civil Law Act, s. 5.<sup>55</sup> It is therefore a significant

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<sup>53</sup> *Id.*, Sec. 11 - 12.

<sup>54</sup> *Id.*, Sec. 6 - 7.

<sup>55</sup> F. M. B. Reynolds, 'The Carriage of Goods by Sea Act 1992' [1993] 4 L.M.C.L.Q. 436.

piece of law reform both for the U.K. and for international trade in general.<sup>56</sup>

Despite this, there are several points which the Act might have clarified but did not. For example, there is no attempt to regulate the availability of action in tort, and the position of charterers holding bills of lading has not been altered by the Act.<sup>57</sup> Therefore, it is likely that some problems under the 1885 Bills of Lading Act still remain. It is considered that the *Carriage of Goods by Sea Act 1992*, as a whole, is a response to perceived existing problems rather than a radical new departure.

For Australia, the Sea-Carriage Documents Acts are a significant improvement of bills of lading legislation. However, because Queensland, Tasmania and Northern Territory have not yet enacted the new Sea-Carriage Documents legislation, problems under the old bills of lading legislation still remain. Those States and Territory should consider reforming their bills of lading legislation in order to create uniformity throughout Australian jurisdictions.

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<sup>56</sup> R. Bradgate and F. White, 'The Carriage of Goods by Sea Act 1992' (1993) *Mod. L. Rev.* 206.

<sup>57</sup> Reynolds, 444.

## CHAPTER VI

### ELECTRONIC DATA INTERCHANGE AND RECENT DEVELOPMENTS CONCERNING THE FORM OF BILLS OF LADING

#### Introduction

International trade is now making extensive and increasing use of computer technology to facilitate international transactions, and as a result is moving toward electronic commerce. The computerised system which has been developed for trading purposes is electronic data interchange (EDI). For example, an EDI system called 'SWIFT' is used in international commerce by the banking industry for the communication of commercial letters of credit among banks worldwide.<sup>1</sup> In the shipping industry, EDI systems have been developed in order to replace traditional paper shipping documents, in particular bills of lading, because the most important advantages of EDI lie with its speed. EDI streamlines the process and speeds up communication. Moreover, it avoids the errors from routine wordprocessing.

However, there are a number of obstacles to the use of EDI for electronic bills of lading, both in terms of computer technology development and legal issues. The major obstacle to the use of electronic bills of lading is the legal requirement for paper-based documentation. A related issue is the way in which electronic messages must be conveyed in order to meet the

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<sup>1</sup> SWIFT (Society for Worldwide Inter-bank Financial Telecommunications) was established to 'facilitate the transmission of bank-to-bank financial transaction messages'. More than a million messages per day are transmitted on SWIFT's global telecommunications network, including letters of credit and bank guarantees. See, for example, R. Burnett, Chapter 1 International Sale of Goods in *The Law of International Business Transactions* (1994).

requirements of bills of lading. At present, there are required to be a documentary form and must be signed.<sup>2</sup>

Moreover, since a bill of lading has an important function as a document of title to the goods shipped, it has a value in as security to banks and entitles its holder to sell the goods while they are in transit. This function of paper bills of lading is not easily incorporated in electronic messages.

Although there have recently been many attempts by national and international organisations to create uniform rules or model law to govern and facilitate the use of EDI, there are a number of difficulties concerning the legal status of electronic messages that create uncertainty over the status of EDI when compared with paper documents. It is obvious that all legal problems associated with the use of electronic data interchange need to be overcome in order to make its systems operate effectively in practice.

This chapter discusses the legal obstacles to the use of EDI systems for electronic bills of lading, in particular, problems concerning the function of paper bills of lading as a negotiable document of title. The first part will look at background developments of EDI and its present situation in international trade. The legal obstacles to the use of EDI in international carriage of goods by sea will also be the major part of this examination. In particular, it will examine the major legal problems as follows: the requirement for a written document, the requirement for a signature and the evidential value of EDI messages.

The second part of this chapter will look at international attempts to facilitate the use of electronic bills of lading. The major development is the proposal by the United Nations Commission on International Trade Law (UNCITRAL) Working Group on EDI which are designed to overcome the

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<sup>2</sup> See for example; J. Y. Gliniecki and C. G. Ogada, 'The Legal Acceptance of Electronic Documents, Writings, Signatures, and Notices in International Transportation Conventions: A Challenge in the Age of Global Electronic Commerce' (1992) 13 *J. Intl. L. Bus.* 117, R. Hill and I. Walden, 'The Draft UNCITRAL Model Law for Electronic Commerce: Issues and Solutions' (1996) 13 *Computer Lawyer*, 18.

problem. This is known as 'the functional equivalence approach'<sup>3</sup>, and is found in the UNCITRAL Model Law on Electronic Commerce (1996). Other attempts, such as the Comité Maritime International (CMI) Rules for Electronic Bills of Lading, the Bolero Project, the *Utah Digital Signature Act* 1955, and the EDI Council of Australia's Code of Practice for EDI 1993 will be examined. Lastly, solutions to the problems which may arise from the use of electronic bills of lading will be discussed.

## Part I

### Developments and Legal Aspects of Electronic Data Interchange

Electronic data interchange (EDI) is one of the computerized systems that is being developed in the area of 'Electronic Commerce' to facilitate and improve international transactions. It is stated that 'EDI is one of the "cars or trucks" that run on the information superhighway'.<sup>4</sup>

Electronic commerce can be defined as commercial activities conducted through an exchange of information generated, sent, received or stored, by electronic, optical, or similar means, including EDI, electronic mail, telegram, telex or telecopy. This definition is based on that contained in Articles 1 and 2 of the UNCITRAL Model Law on Electronic Commerce 1996.<sup>5</sup>

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<sup>3</sup> For History and Purpose of the Model Law see Guide to enactment of the Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, (UN reference A/CN.9/426, 24 April 1996).

<sup>4</sup> For a general discussion on 'Electronic Commerce' see; J. B. Ritter, 'Defining International Electronic Commerce' (1992) 13 *J. Intl. L. Bus.* 3, The Electronic Commerce Innovation Centre, Department of Maritime Studies and International Transport, University of Wales [<http://www.cf.ac.uk//uwcc/masts/ecic/index.html>] (April 1999) [hereinafter Electronic Commerce Innovation Centre].

<sup>5</sup> The text of the Model Law is published in the Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, (New York, 28 May -14 June 1996) General Assembly, Fifty-first Session, Supplement No.17 (A/51/17). See Appendix 5. [hereinafter UNCITRAL Model Law].

Electronic commerce has become more and more practical for thousands of businesses throughout the world. Companies can now exchange information electronically, by combining the functional capabilities of computers and the telecommunication system, rather than sending and receiving paper documents. The use of EDI systems, therefore, may eliminate paper-based documentation and will reduce time and cost in overall businesses transactions. However, many legal problems also arise from the lack of paper documents.

EDI has been developing, particularly in the area of international carriage of goods by sea as electronic bills of lading, because it needs to overcome the complicated functions of bills of lading. If EDI cannot incorporate the most important of these negotiable document of title, it will not be able to facilitate international trade sufficiently. It is noted in the EDI Proposal by the United States to the UNCITRAL Working Group on EDI and point out how important it is to develop EDI in the area of bills of lading:

While the Draft Model Law provides the necessary and basic law to facilitate EDI, it should be supplemented by the working Group for the more complicated functions expected to be needed in Electronic Commerce, such as negotiability and transferability. To be able to address that, it would be useful to identify the potential uses of negotiability and transferability, which are likely to include bills of lading, warehouse receipts, leases and secured transactions, and possibly land sales and mortgages. Commodity trade, currency exchanges, bonds and securities should be dealt with, if at all, at a later stage, although legal issues related to those fields may be relevant now. Other uses could be identified as well.

Next it would be helpful to identify the areas of legal uncertainty surrounding these uses. It can be expected that each use would have its own needs, so it might be best to focus on the particular use most developed for EDI, which is bills of lading.<sup>6</sup>

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<sup>6</sup> UN Doc. A/CN.9/WGIV/WP67 1 February 1995 Electronic Data Interchange, Proposal by the United States of America.

## What is Electronic Data Interchange - EDI?

'EDI' is the term used for the exchange of data message between the computer systems of trading partners. Traditionally the term has been associated with the exchange of trading information and, therefore, was earlier known as 'Trade Data Interchange (TDI').<sup>7</sup> It is frequently used as an electronic replacement for traditional trading documents, such as the order of invoice. But since computer systems are developed and used in finance, administration, customs, etc., EDI is being considered for the exchange of most data messages between originators and recipients of such information.

B. Wright explains the meaning of Electronic data interchange as the direct transfer of structured data between computers by electronic means, i.e. the paperless transfer of business 'documentation'. He clarifies as follows:

Electronic data interchange (EDI) is the computer to computer exchange of business information in a standard format. In other words, it is paperless communication. Its most celebrated application is between two independent firms (or 'trading partners') EDI replaces the physical exchange of routine paper documents such as requests for quotation, quotations, purchase orders, transportation orders, acknowledgments, invoices and check stubs.<sup>8</sup>

Another definition of EDI which is commonly used by some institutes, such as the Electronic Commerce Innovation Centre, University of Wales, and the Electronic Data Interchange Council of Australia (EDICA), is:

'The transfer of structured data, by agreed message standards, from one computer system to another, by electronic means.'<sup>9</sup>

The UNCITRAL Model Law on Electronic Commerce (1996) defines EDI as 'the electronic transfer from computer to computer of information using an agreed standard to structure the information'.<sup>10</sup>

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<sup>7</sup> See 'What is EDI?' in Electronic Commerce Innovation Centre.

<sup>8</sup> B. Wright, *EDI and American Law A Practice Guide* (1989), p. xiii.

<sup>9</sup> *Code of Practice for Electronic Data Interchange (EDI)*, Electronic Data Interchange Council of Australia, (1993), and Electronic Commerce Innovation Centre.

<sup>10</sup> UNCITRAL Model Law, Art. 2.

The direct benefits of EDI are very clear. By eliminating paper documentation and the redundant business procedures, organisations can reduce administrative costs. Moreover, the real benefit is the opportunity to streamline the business process. EDI offers substantial improvements in transactional efficiency, both in cost and speed. In particular, speed of EDI systems may be the most important advantage to international trade.

### **Electronic Data Interchange (EDI) in International Carriage of Goods by Sea**

#### **EDI Development in Australia**

Commercial EDI messaging between Australian business involved in maritime-based importing has been developing. This follows successful development and testing of EDI messages under the auspices of a joint Australian government-funded Tradegate and Electronic Commerce Australia (ECA) project known as EDIMI.<sup>11</sup> The project is intended to result in a standard business approach to using EDI messages for the commercial handing for maritime imports which will complement the EDI messaging already being used in the industry to meet the requirements of business and government.

The Electronic Data Interchange Council of Australia (EDICA) published the Code of Practice for Electronic Data Interchange (the Code) in October 1993. The purpose of the Code is to provide a set of rules which set out minimum standards with which parties doing business by EDI will comply. It does not set out the trading relationship, or the terms and conditions of the sale and purchase, as these must be agreed between the parties. The parties must still have what is commonly known as a 'Trading Partner Agreement'.

The objective of the Code is to establish a set of principles that will:

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<sup>11</sup> See Australian EDI Report: Electronic Data Interchange Newsletter 2 (1995) 6.

1. minimise the legal issues when preparing to trade commercially using EDI;
2. set minimum agreed standards and rules of conduct when using EDI to trade commercially; and
3. create an environment in which the smooth operations of electronic trading can be fulfilled through good and ethical business practices.

The Code is generally adopted by the parties by making reference to it in the trading partner agreement or simply by an exchange of letters. The Code itself consists of a definition section and nine principles including; authentication of an EDI document, offer and acceptance of EDI document, EDI document as evidence and retention for record keeping purposes, and maintenance of security and confidentiality. Even though the Code of Practice for EDI does not specifically apply to bills of lading, it is an important attempt by EDICA to set out rules to assist and facilitate the use of EDI in Australian business and is the first step toward EDI improvement.

### **EDI Implementation in Asian Countries<sup>12</sup>**

Since the economies of Asia, in particular the ASEAN countries<sup>13</sup>, have demonstrated continued growth in recent years, it is very important for these countries to improve their capacity in communications so as to support international transactions. That is to say, developing electronic data interchange to facilitate international trade. The most important issue however is to create a standard for the region. As a result, The Asia Electronic Data Interchange For Administration, Commerce And Transport Board (Asia EDIFACT Board) was established in August 1990 with the first two members: Japan and Singapore. Since then the Asia

<sup>12</sup> Information in this part is gathered from: Asia EDIFACT Board [<http://www.nectec.or.th>] (April 1999), Premonor' Electronic Commerce Resource Guide [<http://www.premonos.com>] (April 1999).

<sup>13</sup> Association of Southeast Asian Nations comprises of 8 countries: Brunei, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

EDIFACT Board has grown extensively, both in the number of its members and in the number of EDIFACT projects in the region. At present the members of the Asia EDIFACT Board are: Japan, Korea, Malaysia, the People's Republic of China, Singapore, Thailand, the Philippines, India and Sri Lanka. Associate members and observers are Taiwan, Mongolia, Hong Kong, and Indonesia.

The major objectives of the Asia EDIFACT Board are to focus; firstly, on the promotion of the use of electronic data interchange in international trade among its members and other countries; secondly, the Board aims to establish an EDI standard that is based on the United Nations Rules for Electronic Data Interchange for Administration, Commerce and Transport (UN/EDIFACT).

The members of the Asia EDIFACT Board are nominees of EDIFACT Committees, or any similar organisation, established in a country that is a member of the United Nations or ESCAP (Economic and Social Commission for Asia and the Pacific). Associate members are nominees of EDIFACT Committees, or any similar organisation, established in an economy that is not a member of the United Nations or ESCAP. The Board has joint (between countries in the region) working groups for technical assessment, awareness and education, finance, customs, purchasing, security, transport, and subgroups on air and sea transport.

### **EDI Implementation in China**

Like other member committees of Asia's EDIFACT Board, the China EDIFACT Committee (CEC) aims at guiding, stimulating and promoting the development and the use of UN/EDIFACT. Also within its scope of duty is to develop and maintain the Chinese standard messages based on UN/EDIFACT, sponsor EDI related studies, promote applications and coordinate activities among various organizations.<sup>14</sup> Many UN/EDIFACT

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<sup>14</sup> A number of local and industry-oriented subcommittees have been set up under China EDIFACT Committee. There was also the Symposium on EDI Strategy and Standards in China in 1992 where policy, strategy, general plan and standards related to EDI development in China were widely discussed.

documents have been translated by the CEC into Chinese including the syntax rules and the UN Trade Data Element Directory.

Chinese customs have put into operation an Automated Entry Processing System (AEPS) at major sea and air ports, such as Beijing, Tianjin, Shanghai, Dalian, Qingdao, Xiamen, Guangzhou and Shenzhen. In the shipping industry, China Ocean Shipping Company (COSCO) has been successfully carrying out EDI commercial activities for several years. It exchanges some shipping documents and ship movement information electronically with foreign shipping companies in Europe, Japan, the U.S. and Hong Kong. At present, the company still uses local standards, which will be transferred to UN/EDIFACT standards when the related standard messages are developed.<sup>15</sup>

### **EDI Implementation in Japan**

Japan EDIFACT Committee (JEC) was established in July 1990 to support and promote EDIFACT related activities in Japan in association with other member countries EDIFACT Committees. More than fifty industrial groups from Trade, Transport, Distribution, Banking Manufacturing, Construction and other sectors have joined the JEC.

Companies in Japan have been using EDI extensively for many years. However, major industry sectors have developed their own EDI standards to be used within their industry. They are ZENGIN Protocol (developed by Japan Bankers Association), JCA Protocol (for chain stores), SHIPNETS Standards for shipping related sectors NACCS (Nippon Automated Customs Clearance System) Standards and EIAJ Standards for electronic manufacturing industry.<sup>16</sup> In 1991, the Japanese government endorsed the use of UN/EDIFACT for international EDI. In 1992, the government

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<sup>15</sup> See Asia EDIFACT Board [<http://www.nectec.or.th>] (April 1999) which refers to UN/ECE Journal for Trade Facilitation and EDIFACT; EDI/EDIFACT Handbook, a handbook by ASEB/Awareness & Education Group.

<sup>16</sup> I. Kenji, 'Successful EDI Implementation in Asia' Reported to EDICOM Conference, (Kuala Lumpur, 1995). The Conference's papers are available at [<http://www.premenos.com/edi/papers/edicom95/>] (January 1997).

introduced a national standard for domestic use, which was developed by the Centre for Information of Industry (CII).

The Japan EDI Council (JEDIC) was established by about fifty private sector organizations in October 1992. The objective of JEDIC is to establish a set of national EDI standards for domestic use unifying all the proprietary and industry-wise standards currently in use. Active industries for EDIFACT in the area of shipping are as follows:

#### Japan Shipowners' Association (JSA)

Japan Shipowners' Association (JSA) formed three subcommittees to examine the BAYPLAN, IFTM and Customs EDIFACT messages used in the transport sector in April 1992. These study groups have now been taken over by a Logistic EDI Study Group established under the initiative of the Ministry of Transport (MOT). The group comprises transport related industries, Customs and the Banking industry.

#### Japan Shippers Council (JSC)

The Japan Shippers Council (JSC), in timely response to significant changes in the international environment and in response to the industry's expectations, has been actively involved in EDIFACT observations and activities as a management body of Japanese trading industry. Under the circumstances, in 1992, the JSC organized a working group to develop UNSMs subset for INVOIC and ORDERS within trading companies, manufacturers and some trade related associations under the framework of JSC.<sup>17</sup>

#### Shipping Cargo Information Network (SHIPNETS)

Shipping Cargo Information Network (SHIPNETS) was established in 1986. In 1991 there were twenty-four shipping companies and 147 freight

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<sup>17</sup> *Ibid.*

forwarders participating in SHIPNETS. Data transmitted through SHIPNETS includes shipping instructions, shipping orders, dock receipts, bills of lading and container load plans. Two other, distinct, but similar systems exist in the shipping industry: S.C. Net (Shipper/Carrier Shipping Information Network System) and S.F. Net (shipper/Forwarder Shipping Information Network System).

In 1992, the Ministry of Transport established a Logistics EDI Study Group whose purpose is to guide, stimulate and promote the development and use of EDIFACT standards in the logistics sector. This group is headed by the Japan Shipowners' Association, and they are examining the development of EDI messages for use in customs, international forwarding, and transport messages.

#### Nippon Automated Cargo Clearance System (NACCS)

Another important example of Japanese EDI implementation is the Nippon Automated Cargo Clearance System (NACCS). It is run by the NACCS Operation Organization which was authorized by the Finance Minister in 1977 to provide a customs clearance system. In early 1991 NACCS was operating in 5 airports and has approximately 150 users and 650 terminals connected. In late 1991, NACCS was expanded to include sea cargo and, because of this, its user base has also expanded. It provides 155 import related applications and 150 export related applications. These include applications for use by the customs administration, customs brokers, air-cargo consolidators, warehouse operators, forwarders and banks. NACCS was established with a combination of government and private investment but is currently funded by charges to users for system usage.

#### **EDI Implementation in the Republic of Korea**

Korea Trade Net (KTNet) was established in 1990 to accomplish a nationwide trade automation by EDI in close corporation with the Ministry of Trade and Industry, and the Korea Foreign Trade Association. The trial stage of KTNet was already finalized successfully in the end of

1992. Participants in the pilot program were leading companies and the impact on EDI markets would be enormous.

After the pilot project, the expansion stage followed till 1994. All paper documents used in export and import trade circles will be targeted. Technical and procedural problems which might be encountered during the trial stage are to be resolved.

The settlement stage started from 1995, and EDI will become an integral part of daily business in Korea. KTNet's ultimate goal as a nationwide EDI network provider is to give EDI service to every business community in Korea.

Korea EDIFACT Committee (KEC) became a legal body for promoting the use of EDI and UN/EDIFACT and represents Korea in the Asia EDIFACT Board as well as other international EDI meetings. The membership of KEC was also strengthened by the participation of influential government bodies such as the Ministry of Agriculture, Forestry and Fisheries, and the Ministry of Health and Social Affairs.

KEC maintains Korean EDIFACT which is based on UN/EDIFACT. Procedures for message development and approval were also set up. The concept of status 1 and 2 of UN/EDIFACT was also adopted. Key elements of KEDIFACT are Syntax Rules, Message Design Guidelines, Data Elements Directory, Composite Data Elements Directory, Segments Directory and KRSMs (Korean Standard Messages). More than 100 companies, banks, ocean carriers and companies belong to the message development and other working groups of KEC. The overall basis of standard development activities has therefore been set up.

There has been a significant development in completing the legal procedures for EDI in Korea. This was the notice of the Ministry of Trade and Industry in September 1992. As a final step of 'The Act on Promotion of Trading Business Automation' which was enacted in December 1991, the notice was to provide a legal basis of standardization of EDI in Korea.

## **EDI Implementation in Malaysia**

In Malaysia, the government initiative towards EDI implementation began when the Cabinet Committee on Infrastructure on Investment made a decision in April 1989 that the Ministry of Transport should implement an EDI system for customs clearance and trade facilitation in main ports.

Since then a major study has been conducted and public awareness on the importance of EDI has been generated through a series of seminars, workshops and mass-media publications on EDI. Activities on EDI standards have also gained momentum culminating in the acceptance of Malaysia as a member of the Asia EDIFACT Board in May 1992.

### **EDI study for Port Klang Community System**

The objective of the EDI study for Port Klang Community System is to formulate a strategic and operational plan for implementing EDI. This is designed to expedite cargo clearance and trade facilitation in the Klang Valley region. The study recommends an online community system linking Customs, international carriers, terminal operators and freight forwarders.

Applications deriving from the Community System are the Direct Trader Input which facilitates customs clearance and a cargo inventory control for tracking cargo status.

### **EDI between Penang Port Commission (PPC) and Port of Singapore Authority (PSA)**

In 1992, a memorandum of understanding was signed between Penang Port Commission and Port of Singapore Authority (PSA). The memorandum sets out the basis of cooperation between PPC and PSA for the establishment of an EDI link relating to the exchange of shipping information between these two organisations.

## **DAGANG-NET**

EDI Malaysia, under the auspices of the National Chamber of Commerce and Industry of Malaysia, has been entrusted by the Government of Malaysia with the task of developing the National EDI Clearing Centre - DAGANG-NET. Through the Ministry of International Trade and Industry as a coordinating body, EDI Malaysia is dedicated to promoting the use of EDI to ensure that companies improve their competitive edge in international trade.

### **EDI Implementation in Singapore**

EDI in Singapore has been expanded to many sectors of the economy: trading, medical, legal, retail, manufacturing, finance and transport. TradeNet, the nationwide EDI system for the trading community in Singapore, was introduced in 1989.

It now processes more than ninety-five percent of all trade declarations required for the import and export of goods in and out of Singapore. TradeNet has also been extended to traders, freight forwarders and cargo agents outside Singapore. About 6,000 users participate in this community system.

The Trade Development Board is currently embarking on a total trade documentation system study which will introduce the use of EDI in the entire process flow involving trading, government, transport, insurance and banking sectors. The Singapore EDIFACT Committee (SEC) was restructured recently to look into a broader perspective of EDI. In line with the increase in scope, the name was changed to the Singapore EDI Committee. The committee will now look into all areas of EDI, including EDIFACT.

Under the SEC, Message Development Groups, Technical Assessment Group, Awareness and Education Groups, User Interest Groups and Technology Group have been reorganized. MDG includes sectorial groups which are Finance, Sea Transport, Air Transport, Manufacturing and Government Procurement.

In June 1998 Singapore passed the Electronic Transactions Act and in so doing it has become one of the first countries to have legislation regulating electronic commerce. The Act covers a wide spectrum of issues, including general recognition of electronic records, electronic contract, and digital signatures.<sup>18</sup>

### **EDI Implement in Taiwan**

In Taiwan many EDI related projects are under way, the total investment being around US\$120 million. Major projects are expected to publish a local version of EDIFACT standards, to participate in EDIFACT related activities (like UN/ECE WP.4 meeting and JRT), and to develop some EDI network system, (such as TRADE-VAN, Pilot EDI system in auto-manufacturing industry, EDI in the manufacturing industry and commerce automation project).

The automated air-cargo clearance system was formally introduced for customs clearance procedures in 1992 after a half year trial. A total of 185 participants from twelve industries, such as customs brokers, traders, banks, airlines, and shipping companies joined this community system. Twenty-four data messages were developed for the project, based upon UN/EDIFACT standards and the system is planned to extend into sea-cargo clearance procedures.

### **EDI Implementation in Thailand**

The Thai government established the National Information Technology Committee (NITC) in March 1992 to promote, monitor, and facilitate the implementation of the country's information technology development plan. In December 1993, the Thailand EDI Council (TEDIC) was established as one of the subcommittees under the NITC. The Thailand EDI Council comprises representatives from various public and private agencies, such as the Ministry of Commerce, Office of the Board of Investment, the

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<sup>18</sup> R. Chandran, *Singapore's Electronic Transactions Act 1998*, [1999] J.B.L. 80.

Ministry of Industry and the Port Authority of Thailand. It represents Thailand on the Asia EDIFACT Board and has the main objective of promoting electronic data interchange for international trade.

At present, TEDIC's main project is to establish an EDI service for Customs Department, as well as airline, shipping and freight forwarders. Another important project concerns legal infrastructure, which aims to study EDI law and recommend measures to improve existing law and law reforms.

The Port Authority of Thailand (PAT) introduced an electronic data interchange system in July 1995 to computerise its services at the Bangkok Port in Klong Toey and the Laem Chabang Port in Chon Buri. The system, called 'Thailand Port Connect', was used to manage PAT's accounts and to control PAT's services for cargo containers, customs clearance, and bill issues to charge cargo handling fees. PAT's system would connect the Bangkok Port with the Laem Chabang Port and with information systems of about ten private companies dealing with PAT. It also planned to link the Thailand Port with ports in Singapore, to coordinate cargo transportation by sea between the two countries.<sup>19</sup>

### **Electronic Data Interchange (EDI): The Legal Problems**

As was earlier noted in chapter V, the major legal obstacles to the greater use of electronic bills of lading are the following factors;

1. the requirement of a 'document',
2. documents of title and negotiability,
3. signature and other authentication,
4. evidential value of EDI messages,
5. formation of contracts, and
6. communication.

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<sup>19</sup> Bangkok Post, March 24, 1995, 6.

## The Requirement of a Document

Traditional bills of lading have been used in international trade in the form of a written document; normally they are issued in a set of three originals by the master of the ship. As the bill of lading performs a function as a document of title to the goods shipped, it is essential that the bill must be in the form of a paper document which can be physically transferred from one person to another. This requirement has been imposed by relevant local and international legislation even though this legislation does not define bills of lading. For example, the Hamburg Rules have provisions on the issuing of bills of lading and the contents of bills of lading which require the bill to be signed.<sup>20</sup> This means that the current bills of lading legislation only applies to bills of lading in paper form.

Therefore, an attempt to introduce an EDI system as an electronic bill of lading must do something to satisfy the need of a paper document. It is not sufficient for the parties to agree to use an EDI system and name it a kind of bill of lading since it does not qualify as a bill of lading. Moreover, there are strict judicial approaches to defining a 'bill of lading'. These are demonstrated in the New South Wales Court of Appeal's decision in *Carrington Slipways Pty. Ltd. v. Patrick Operations Pty. Ltd. (The Cape Comorin)*,<sup>21</sup> and the Federal Court of Australia's decision in *Comalco Aluminium Ltd. v. Mogal Freight Services Pty. Ltd. (The Oceania Trader)*,<sup>22</sup> which involved paper documents. In the *Cape Comorin* it was held that a document named 'house bill of lading' was not a bill of lading, even though it appeared to be one. On the other hand, in the *Oceania Trader* a document named 'consignment note' was held to be a bill of lading. These two cases demonstrate the strict interpretation of a 'bill of lading' and show that even documents which appear to be a bill of lading may not be under the law.

## Document of Title and Negotiability

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<sup>20</sup> Article 14 - 15 of the Hamburg Rules.

<sup>21</sup> (1991) 24 N.S.W.L.R. 745.

<sup>22</sup> (1993) 113 A.L.R. 677.

Another major obstacle concerning the use of EDI as a bill of lading is whether it can perform the important function of a traditional bill of lading as a document of title and whether it can be a 'negotiable document of title'. This is because this is the most substantial function of bills of lading, in particular for a chain of sale of goods during carriage and also for the banking system of documentary credit.

As already noted, the CMI Rules for Electronic Bills of Lading are an attempt to overcome this problem by allowing the shipper who becomes the holder under the Rules to exercise rights of control and transfer of goods. Rule 7 of the CMI Rules provide:

#### 7. Right of Control and Transfer

- a. The Holder is the only party who may, as against the carrier:
  - (1) claim delivery of the goods
  - (2) nominate the consignee or substitute a nominated consignee for any other party, including itself;
  - (3) transfer the Right of Control and Transfer to another party;
  - (4) instruct the carrier on any other subject concerning the goods, in accordance with the terms and conditions of the Contract of Carriage, as if he were the holder of a paper bill of lading.
- b. A transfer of the Right of Control and Transfer shall be effected: (i) by notification of the current Holder to the carrier of its intention to transfer its Right of Control and Transfer to a proposed new Holder, and (ii) confirmation by the carrier of such notification message, whereupon (iii) the carrier shall transmit the information as referred to in article 4 (except for the Private Key) to the proposed new Holder, whereafter (iv) the proposed new Holder shall advise the carrier of its acceptance of the Right of Control and Transfer, whereupon (v) the carrier shall cancel the current Private Key and issue a new Private Key to the new Holder.
- c. If the proposed new Holder advises the carrier that it does not accept the Right of Control and Transfer or fails to advise the carrier of such acceptance within a reasonable time, the proposed transfer of the Right of Control and Transfer shall not take place. The carrier shall notify the current Holder accordingly and the current Private Key shall retain its validity.

- d. The transfer of the Right of Control and Transfer in the manner described above shall have the same effects as the transfer of such rights under a paper bill of lading.

It should be noted that 'Private Key' means any technically appropriate form, such as a combination of numbers and letters, on which the parties may agree for securing the authenticity and integrity of a transmission.

The CMI Rules provide the procedure in which the shipper who becomes 'the Holder' has the 'Right of Control and Transfer', but the Rules do not define its meaning. It seems that the Rules seek to avoid the problem of transfer of property in the goods by giving the shipper the right of control and transfer, and the right to claim delivery of the goods instead. Even though Rule 7 provides that the transfer of right of control and transfer shall have the same effect as the transfer of such rights under a paper bill of lading, it is unlikely that this shall have the same effects under bills of lading legislation.

In particular, the Rules do not make any provision on the right of suit under the contract of carriage which is the major issue in connection with negotiable documents of title. Moreover, comments made by the Maritime Law Association of Australia and New Zealand<sup>23</sup> pointed out that one disadvantage of the CMI Rules is that it is the actions of the carrier, not the shipper or the consignor of the goods, that determine when the right of control of the goods is effectively transferred.

### **Signature and other Authentication**

Under present bills of lading legislation of most countries, a bill of lading needs to be signed by the carrier or his agent. For example, Article 14 of the Hamburg Rules provides:

Article 14. Issue of bill of lading ...

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<sup>23</sup> A submission made in response to the draft Discussion Paper, See Attorney-General's Department of Australia, Revised Discussion Paper: Proposals for Reform of Australian Bills of Lading Legislation, (1994) 26. [hereinafter, Discussion Paper].

2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.

3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.<sup>24</sup>

In the electronic message context, a signature or other authentication might be done by using secret digital codes or a 'Private Key' as provided in the CMI Rules or in the *Utah Digital Signature Act 1995*.<sup>25</sup> However, under present legislation it is unlikely that any form of electronic authentication can be accepted as a 'signature'. This is because the judicial definitions of the word 'signing' seem to be restricted to manual signatures.<sup>26</sup> It is noted that in circumstances where it is not certain whether the courts will include an electronic form of authentication as a signature, it is likely that such uncertainty will be overcome only by legislation.<sup>27</sup>

### Evidential Value of EDI Messages

A further legal problem arising from the use of electronic bills of lading concerns the evidential value of an EDI message. At common law all computer generated information, such as a computer print-out messages, has been classified as hearsay evidence. However, it should be noted that a computer generated message may be admitted as evidence, for example, if it is a business record created in the ordinary course of commercial activity.<sup>28</sup> One possible issue concerns whether the evidential value of EDI

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<sup>24</sup> *The Hamburg Rules* do not apply in Australia since the Australian Government, on 12 October 1994, agreed to defer the implementation of the Rules for a further three years, as per para 2 (3) (b) of the *Carriage of Goods by Sea Act 1991* (Cth).

<sup>25</sup> See *Utah Digital Signature Act 1995* at p. 217 below.

<sup>26</sup> See *R v Moore*, (1984)10 VLR 322 at 324. where it was held that:

'A signature is only a mark, and where a statute merely requires that document shall be signed, the statute is satisfied by proof of making of a mark upon the document by or by the authority of the signatory.'

<sup>27</sup> Discussion Paper, 31.

<sup>28</sup> *Id.*, at p.32.

messages will satisfy the 'best evidence rule', where there is no other available evidence when an electronic system is used instead of paper documents. In these circumstances EDI messages would be the best available evidence.<sup>29</sup>

There are arguments on the issue of originality of documents as between the computer record and the print-out message. One view regards only the computer record, or 'electronic document', as the original and the 'print-outs' as copies of such documents.

There exists one document only in the strict sense of the word, namely the 'electronic document' stored into the record of the machine. All print-outs produced by the machine are copies of the one and only electronic document... [L]awyers ...have been led astray by the idea that a print-out emerging from the machine is analogous to a traditional transport document and, in fact, functions as such. Clearly this is not so.<sup>30</sup>

Another view on this issue is expressed by the UNCITRAL Working Group on EDI who are of the opinion that the concept of originality was a concept limited to traditional paper-based documents and in view of the manner in which computer records were created, maintained and communicated, it was impossible to speak of original computer records or 'electronic documents'.<sup>31</sup>

### **Formation of Contracts**

At common law the formation of contracts is generally governed by offer and acceptance principles. Parties to a contract can make their own arrangements as to the means used in formation of contracts. Therefore, if an EDI system is used in commercial communication to arrange a contract, (referred to by some as an 'electronic handshake' or 'interchange

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<sup>29</sup> See B. Wright, *The Law of Electronic Commerce EDI, FAX, and E-MAIL: Technology, Proof, and Liability*. (2nd ed., 1993) ch. 7-8.

<sup>30</sup> C. M. Schmitthoff and R. M. Goode, (eds.), *International Carriage of Goods: Some Legal Problems and Possible Solutions*, (1988), at p. xxxiii.

<sup>31</sup> United Nations Commission on International Trade Law, *Report of the Working Group on Electronic Data Interchange (EDI)* of the Work of its Twenty-fifth session (New York, 4-5 January 1993), A/CN.9/373, p. 21)

agreement'), there are problems concerning the validity of the contract formed by such electronic system and also the time and place of formation of the contract.

One possible solution is proposed in the UNCITRAL Model Law on Electronic Commerce as follows:

#### Article 11 Formation and validity of contracts

(1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose. ...

### Communication

The last question in the context of EDI usage concerns who will bear the risk of a failure or error in communication, in particular, where third parties are involved. It is noted that at this stage special legislation dealing with allocation of risk in the multiplicity of EDI contracts would not appear appropriate.

## Part II

### Electronic Bills of Lading

It is difficult to predict the exact form of electronic bills of lading which will overcome the legal problems. However, its development would be an alternative or a better way in commercial practice. Therefore, in respect of new developments in this area, it would be desirable that bills of lading legislation be changed so as to become flexible enough to adopt or apply to electronic data interchange development.

Recently, several significant steps have been taken to promote the use of EDI, particularly in the area of electronic bills of lading.<sup>32</sup> The purpose of this part is to examine these developments.

It should be noted that the most important step toward EDI is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce. UNCITRAL is attempting to develop uniform international rules that would validate and encourage the use of EDI. In 1995, UNCITRAL adopted the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication.<sup>33</sup> The Model Law is intended to serve as a guide to countries in creating uniform law and practice involving the use of computerised systems in international trade. The objectives of the Model Law are essential to improve efficiency in international trade since it will, if adopted by a large number of countries, enable and facilitate the use of EDI and the related means of communication. In addition, it will provide for equal treatment to users of paper-based documentation and to users of computer-based information.

UNCITRAL approved the final draft of the Model Law on Electronic Commerce at its twenty-ninth session in June 1996.<sup>34</sup>

#### Electronic Data Interchange and Functional Equivalence Approach

The Model Law applies to any kind of information that is transferred in the form of a data message used in commercial activities. Ocean bills of lading are one kind of document within the scope of the Model Law. However, the legal aspects of bills of lading are key issues of the Model

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<sup>32</sup> See for example; D. Faber, 'Electronic Bills of Lading' [1996] 2 L.M.C.L.Q. 232., J. Livermore and K. Euarjai, 'Electronic Bills of Lading: A Progress Report' (1997) 28 *J. Mar. L. & Com.* 55.

<sup>33</sup> The text of the draft Model Law was published in the Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, (New York, 28 May-14 June 1996) (A/CN.9/421).

<sup>34</sup> UNCITRAL Model Law, See Appendix 3.

Law developments, as noted in the UNCITRAL Working Group on EDI in its thirtieth session, 26 February-8 March 1996. This reported that the future work could focus on EDI transport documents, with particular emphasis on maritime electronic bills of lading and the possibility of their use in the context of the existing national and international legislation dealing with maritime transport.<sup>35</sup>

It should be noted, however, that the Model Law has no legal force of its own. Its provisions will have legal enforcement only if they are enacted in national law. For this reason, UNCITRAL also adopted a Guide to enactment of the Model Law.<sup>36</sup>

### **Application of Legal Requirements to Data Messages**

'Electronic Data Interchange' or 'EDI', as defined by the Model Law, means the electronic transfer from computer to computer of information using an agreed standard to structure the information.<sup>37</sup> The main issues related to EDI which have been discussed internationally and proposed solutions by the Model Law are:

1. legal recognition of data messages,
2. writing or a 'document' requirement,
3. signature requirement, and
4. document of title and negotiability.

The Model Law is based on the recognition that legal requirements for the use of paper documents are the main obstacle to the development of EDI. EDI itself cannot be regarded as an equivalent of a paper document, both in nature and legal aspects. Therefore, the Model Law introduced a new approach known as 'functional equivalent approach' which is based on an analysis of the functions of paper-based requirements and determining how those functions could be fulfilled through EDI.

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<sup>35</sup> Provisional Agenda, The UNCITRAL Working Group on EDI, thirtieth session, 26 February-8 March 1996. p.3 (A/CN.9/WG.IV/WP.68 22 December 1995).

<sup>36</sup> Guide to enactment of the Model Law, *op. cit.*

<sup>37</sup> UNCITRAL Model Law, Art. 2

## **Legal Recognition and Evidential Value of Data Messages**

The first questions are whether a data message can be treated as a document and whether it can be accepted as evidence in the courts. In many countries, under both civil law and common law systems, computerised records are generally admissible as evidence. For example, the English courts have recognised other means of passing on information than paper documents. In *Derby & Co. v. Weldon* (No 9),<sup>38</sup> Vinelott J. held that the database of a computer, in so far as it contained information capable of being retrieved and converted into readable form and whether stored in the computer or recorded in backup files, is a document for the purposes of the High Court rules governing discovery of documents.

The 'best evidence rule' requires presentation of the best available evidence. In the case where there is an original document, a data message may not be accepted as the best evidence and instead may be considered as hearsay evidence. However, in the case where there is no original document, a data message or a computer print-out could be considered as the best available evidence.<sup>39</sup>

A solution to the problem given by the Model Law is provided in Article 4, that information shall not be denied effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message.<sup>40</sup> Article 8 also provides, in reference to admissibility and evidential value of data messages in any legal proceedings, that nothing in the application of the rules of evidence shall apply so as to prevent the admission of a data message in evidence on the ground that it is a data

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38 [1991] 1 W.L.R. 653.

39 It should be noted that in some jurisdictions amendment has already been made to the law of evidence in order to support the use of EDI. For example, the Malaysian *Evidence (Amendment) Act 1993* (an Act to amend the *Evidence Act 1950*) defines 'document' as: "any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of - (a) letters, figures, marks, symbols, signals, or other forms of expression, description, or representation whatsoever;..."

40 "Data message" means information generated, stored or communicated by electronic, optical or analogous means including, but not limited to, electronic data interchange(EDI), electronic mail, telegram, telex and telecopy.

message, or if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form. Article 8 is intended to make it clear that no matter how the 'best evidence' or 'hearsay' rules apply to data messages, they will not alter the legal recognition and evidential value of such data messages.

### The Requirement of a 'writing' or a 'document'

The requirement of a 'writing' or a 'document' is imposed or implied by laws in most jurisdictions. In Australia, for example, before its amendment in 1997,<sup>41</sup> the *Carriage of Goods by Sea Act 1991* (Cth) defined the term 'contract of carriage' as 'a contract of carriage covered by a bill of lading or any similar document of title...' The definition of 'document' provided in section 25 of the *Acts Interpretation Act 1901* (Cth) includes: (a) any paper or other material on which there is writing; (b) any paper or other material on which there are marks, figures... having a meaning for persons qualified to interpret them; and (c) any article or material from which sounds images or writings are capable of being reproduced with or without the aid of any other article or device.

As already noted, although an English court has held that the database of a computer is a document for the purposes of the High Court Rules,<sup>42</sup> this, however, may not satisfy the requirement of 'writing'. Since the definition of 'writing' in the *Interpretation Act 1978* (U.K.) includes 'typing, printing, lithography, photography and other modes of representing or reproducing words in visible form', an electronic message itself is not visible and cannot be included in the meaning of 'writing'. Therefore, if a document is required to be written, such an electronic message is not a document. One observer presents a view that since electronic communication is more common, the word 'document' should be more generously construed.<sup>43</sup>

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<sup>41</sup> See the *Carriage of Goods by Sea Amendment Act 1997* (Cth) in Chapter VII.

<sup>42</sup> *Derby & Co. v Weldon* (No 9) [1991] W.L.R. 653.

<sup>43</sup> D. Faber, 'Electronic Bills of Lading' [1996] 2 L.M.C.L.Q. 232. The author refers to *J.H. Tucker & Co. Ltd. v. Board of Trade* [1995] 1. W.L.R. 655, 658, where Vaisey, J. stated that he was interpreting the word 'document' 'in the ordinary sense in which the business uses it': at the time of the case this would only have

The Model law expressly gives electronic transmissions the same legal status as writings. It provides that: 'Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message'.<sup>44</sup> Article 6 provides that where the national law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be useable for subsequent reference.<sup>45</sup>

### **Signature and Other Authentication**

The most common form of authentication required by domestic and international law is a manual signature. The function of a signature is very significant not only because it authenticates parties to a contract but also evidences an intention to be legally bound. Authentication of a transmission by a signature is therefore an indication to the recipient and third parties to the document (together with the party who issues that document) that each will be bound by its contents.

The Hamburg Rules provide for a signature to be 'in writing, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued'.<sup>46</sup> Most provisions of the Australian bills of lading legislation require a signature.<sup>47</sup>

The word 'signature' appears to be restricted by the courts to manual signatures. Consequently, it is not certain that the courts will include an electronic form of authentication as a 'signature', so this uncertainty could only be resolved by legislation. A facsimile signature was accepted as a signature by the High Court of Australia in *Electronic Rentals Pty. Ltd. v. Anderson*<sup>48</sup>. However, the area is not entirely clear. In *Molodyski v. Vema*

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meant materialized documents.

<sup>44</sup> UNCITRAL Model law, Art. 5. See Appendix 3.

<sup>45</sup> *Id.*, Art. 6.

<sup>46</sup> Hamburg Rules, Article 14 rule 3.

<sup>47</sup> See Australian bills of lading legislation, *op. cit.*

<sup>48</sup> (1971) 124 C.L.R. 27 per Windeyer J, 42.

*Australia Pty. Ltd.*<sup>49</sup> the issue was whether a fax of a signed document amounted to a document signed by the sender (the offerer) which was then signed by the recipient (offeree) amounted to a binding signed agreement. Cohn J. (obiter) stated that whether delivery of fax of a signed document is effective as delivery of the original signed agreement depends on the intention of the signatory. If the signatory intends the facsimile signature to be used to authenticate the document and regarded it as one's signature, then the document is to be regarded as a copy duly signed.

In *Twynam Pastoral Co Pty. Ltd. v. Anburn Pty. Ltd.*<sup>50</sup> Young J. assumed, that a fax could not meet both the writing and signature requirements. In contrast to these two decisions, in *NM Superannuation Pty. Ltd. v. Baker and Others*<sup>51</sup> Cohen J. (obiter) suggested that a faxed signature was not the original signature and so might not be adequate where a signature was required. In this case the issue did not require a decision as there was no signature required in the matter at issue.

In the context of EDI systems, a signature or other authentication can be provided in many ways, for instance, (1) by using secret digital codes, similar to PIN numbers used for automatic teller machines; (2) by using a more complicated system of public keys cryptography which provide a mathematical scheme for arranging computer data; (3) by using a 'digital signature' as in the *Utah Digital Signatures Act 1996* approach;<sup>52</sup> or (4) by using specific computer software such as 'PENOP' where a person signs the computer screen and the software encrypts the signature and other data.<sup>53</sup>.

The question as to which electronic signatures technology is appropriate for electronic bills of lading is beyond the scope of this thesis. However, the point can be made that these methods of authentication of data messages

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<sup>49</sup> (1980) NSW Conv R 55-446.

<sup>50</sup> Unreported, New South Wales Supreme Court, 15 August 1989.

<sup>51</sup> [1992] 7 ACSR 105.

<sup>52</sup> See below at p. 217.

<sup>53</sup> PenOp is a pen-based computing software component that captures and verifies signature (autographs) and link them to specific electronic documents. See 'PENOP' – *Alternatives for Signing Electronic Documents* [<http://www.penop.com>] (April 1999).

may technically verify the origin of the messages but may not meet the legal requirement for signature.

The Model Law explicitly gives appropriate technical solutions the same legal validity as a traditional signature and allows the parties to agree on specific means. Article 7 of the Model Law provides that:

- (1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:
  - (a) a method is used to identify that person and to indicate that person's approval of the information contained therein; and
  - (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all circumstances, including any agreement.
- (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.
- (3) The provisions of this article do not apply to the following:  
[...]

According to this article, the Model Law does not require a specific mode of signature, any electronic signature technologies can be introduced in the future as appropriate without changing the law.

### **Document of Title and Negotiability**

Negotiable document of title is a key function of bills of lading. A question concerning documents of title and negotiability in an electronic bills of lading context is whether negotiability and transferability of rights in goods can be accommodated in electronic bills.

The UNCITRAL Working Group on EDI has not yet finished its study on this problem. Future work planned on EDI involves a discussion on the negotiability and transferability of rights in goods concerning maritime bills of lading. This study will consider a number of recommendations and proposals by countries and international organisations.

An interesting proposal was noted by the United States of America and raises an issue to be considered of the Working Group: 'It should be borne

in mind that what is being ‘transferred’ is not the paper or EDI message (that being just the medium), but the rights and/or title to the subject of the transaction’.<sup>54</sup> We will need to wait and see what the outcome will be of the last and most important issue of the functional equivalent approach, which should be added to the final text of the Model Law.

### **Other Attempts to Overcome EDI’s Problems**

Apart from the extensive work of the UNCITRAL on EDI uniformity in international trade, there have also been other efforts by countries and other organisations to facilitate the use of EDI as bills of lading. For example, UN/EDIFACT (Electronic Data Interchange for Administration, Commerce and Transport) has developed the standard electronic messages that are necessary to create an electronic bill of lading. The Comité Maritime International (CMI) has provided a set of rules for the use of electronic bills. There are also supporting rules by the International Chamber of Commerce (ICC); the provisions related to the use of electronic bills of lading in INCOTERMS 1990 and UCP 500.<sup>55</sup>

#### **The CMI Rules for Electronic Bills of Lading 1990**

The Comité Maritime International (CMI) adopted Rules for Electronic Bills of Lading in 1990. The CMI Rules are voluntary rules so they will apply only if the parties to a contract of carriage agree, the Rules will then operate by incorporation into the contract. The CMI Rules provide for a central registry system for electronic messages as bills of lading.

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<sup>54</sup> Electronic Data Interchange: Proposal by the United States of America, note by the Secretariat (UN reference A/CN.9/WG.IV/WP.67 1 February 1995).

<sup>55</sup> INCOTERMS 1990 Article A.8. Proof of delivery, transport document or equivalent electronic message provides: ‘Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraphs may be replaced by an equivalent electronic data interchange (EDI) message.’

UCP 500 Article 20 provides that a document may be signed by handwriting, by facsimile signature, by perforated signature, by stamp, by symbol, or by any other mechanical or electronic method of authentication.

The CMI rules are operated by the carrier issuing to the shipper an electronic bill of lading using electronic messages together with a private code or 'key', possession of which entitles the holder to control the goods. This right of control is passed to other interests after notification by the shipper to the carrier, who cancels the original key and gives a new key to the new person entitled to control of the goods. In this way the key holder should have the same rights as the bill of lading holder.

The CMI Rules therefore provide a solution to the legal requirements of written documentation and signature as the carrier, shipper and all subsequent parties utilizing these procedures agree that any national or local law, custom or practice requiring the contract of carriage to be evidenced in writing and signed, is satisfied by these procedures. In agreeing to adopt these Rules, the parties shall be taken to have agreed not to raise the defence that this contract is not in writing.<sup>56</sup>

The CMI Rules are currently a useful set of rules that establish a procedural basis for the use of electronic bills of lading. However, the Rules lack provisions dealing with issues of what constitutes an actual receipt of an offer and subsequent acceptance. The Rules also have no guidelines in the event of system failure.<sup>57</sup>

### **Project Bolero (Bills of Lading for Europe)**

The most recent project on electronic bills of lading is a pilot project called 'Bills of Lading for Europe' (Bolero).<sup>58</sup> The project is being operated by a business consortium of shipping companies, banks and

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<sup>56</sup> Rules 11 of the CMI Rules.

<sup>57</sup> For comments on the CMI Rules see, for example, R. B. Kelly, 'The CMI Charts a Course on the Sea of Electronic Data Interchange: Rules for Electronic Bills of Lading' 16 Mar. Law. 1992, 349.

<sup>58</sup> The project started in April 1994 and the operating system had been created in June 1995 and the trials started. Users of the project are based in the U.K., the Netherlands, Sweden, Hong Kong and the U.S. The trials lasted until mid-September and were generally considered a great success. For more details on Bolero see: 'Trading in tune with Bolero', Banking Technology, (1994) 48.; 'Bolero Trade Steps', The Banker, 145 (1995) 72.

telecommunications companies and aims to replace paper-based shipping documents with an online computerised registry.

The project attempts to address the special legal issues that arise when paper negotiable documents are converted into electronic form. In particular, Bolero's initial focus is the use of EDI systems as negotiable bills of lading. The processes used in the project are based on the CMI Rules for Electronic Bills of Lading. The replacing of paper-based international trade documents with EDI messages will result in time and cost savings<sup>59</sup> and also increase level of security against fraud and reduce the possibilities for error.

The Bolero services are based on the exchange of EDI messages between a central service known as the 'registry' and users. The users normally are carriers, shippers, freight forwarders and banks, who will send and receive messages from the central registry by means of a computer workstation. Users also will be able to exchange messages directly between themselves. The central registry will contain details of shipping documents contained in a 'consignment record'. Access to these details will be available to those users with the appropriate authority. The central registry will validate and authenticate messages received, and automatically generate messages to other users in response to messages received.

Under the Bolero project, there are strong security controls and procedures to protect the integrity and prove the authenticity of electronic messages. The particularly important security feature is the use of digital signature techniques. These authenticate the message sender and prevent modification of transactions in transit.

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<sup>59</sup> According to estimates published by the Bolero consortium, use of the service could lead to administrative cost reductions of up to 40 per cent resulting in a saving of ECU 54,000 million on a global basis. See 'Trading in tune with Bolero' at p. 48.

### *The Carriage of Goods by Sea Act 1992 (U.K.)*

The *Carriage of Goods by Sea Act 1992* (U.K.) replaced the *Bills of lading Act 1855* and generally deals with title to sue problems. Nevertheless, the Act also provides an open provision to extend its applications to cases where an EDI system is used. Section 1 (5) allows the Secretary of State to make provisions for information given by means other than in writing to be equivalent and effective as if it had been given in a written document.<sup>60</sup>

### *Utah Digital Signature Act 1995*

The *Utah Digital Signature Act 1995*<sup>61</sup> (the '1995 Utah Act') is the first legislation in the world to authorise the use of digital signatures. The Act was adopted in February 1995 and took effect on May 1, 1995. But implementing regulations have not been adopted. The Act should be fully implemented and ready for business when the amended Utah Act takes effect, presumably in May 1996.<sup>62</sup> The 1995 Utah Act specifies the use of public key encryption and defines a scheme for licensing certification authorities. Digital signatures are created and verified by means of 'cryptography', the branch of applied mathematics that is concerned with transforming messages into seemingly unintelligible forms and back again. For digital signatures, two different keys are generally used, one for creating a digital signature or transforming data into a seemingly unintelligible form, and another key for verifying a digital signature or returning the message to its original form. The keys of an cryptosystem for digital signatures are termed the 'private key', which is known only to the signer and used to create the digital signature, and the 'public key', which is ordinarily more widely known and is used to verify the digital

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<sup>60</sup> Section 1(5) - (6) of the *Carriage of Goods by Sea Act 1992* (U.K).

<sup>61</sup> Utah Code Ann. §§ 46-3-101 et seq.

<sup>62</sup> The Act's drafting history and general operation are further described in Kennedy & David's, Bartloby the Cryptographer: Legal Profession Prepares for Digital Signatures, (1996) N.Y.L.J. at S4; and Semerad, 'Signature Act Will Make Pioneers of Utah Court—Digital Signatures Make Utah a Pioneer' (1995) *Salt Lake Trib.*, at D1. Similar laws can now be found in a number of other states, including California, Florida, and Washington. See also Utah Digital Signature Law [<http://www.state.ut.us/ccjj/digsig/default.htm>] (June 1996).

signature. A recipient must have the corresponding public key in order to verify that a digital signature is the signer's.<sup>63</sup>

Use of digital signatures is comprised of two processes, one performed by the signer and the other by the receiver of the digital signature.

1. First, digital signature creation is the process of computing a unique code derived from both the signed message and a given private key. For that code or digital signature to be secure, there must be at most only a negligible chance that the same digital signature could be created by any other message or private key.
2. Second, digital signature verification is the process of checking the digital signature by reference to the original message and a public key, and determining whether the digital signature was created for that same message using the private key that corresponds to the referenced public key.

The *Utah Digital Signature Act*, although it does not expressly apply to bills of lading, has very extensive objectives to adopt rules governing the effect of digital signature which may be used in various kinds of documents. However, the main objective of the Act as provided in 'Part 4. Effect of a Digital Signature', is that 'This part provides that a digital signature has about the same legal effects as a handwritten signature on paper.' Therefore, the Act should be studied for the possibility of adoption at international level, in order to facilitate the use of electronic bills of lading.

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63 Utah Code Ann. §§ 46.

Part 1. Short Title, Interpretation, and Definitions

"103. Definitions:

(16) "Key pair" means a private key and its corresponding public key in an asymmetric cryptosystem, keys which have the property that the public key can verify a digital signature that the private key creates."

## **The Carriage of Goods by Sea Amendment Act 1997 (Cth) and the Sea-Carriage Documents Acts (1997-1998)**

The Australian *Carriage of Goods by Sea Amendment Act 1997 (Cth)* and the *Sea-Carriage Documents Acts*<sup>64</sup> are the latest attempts to bring electronic bills of lading into practice. In 1992, the Australian Federal government has had before it the proposals for reforming bills of lading legislation in order to update its legislation and eliminate some of the legal problems incorporated in bills of lading. Recommendations made by the Attorney-General's Department Discussion Paper suggested that any reform of the legislation should include a provision to cover cases where EDI systems are used, and the UNCITRAL functional equivalence approach should be examined with a view to its applicability to electronic bills of lading.<sup>65</sup>

As a result of the proposals, the Australian Federal government presented the *Sea-Carriage Documents Bills* to the Federal Parliament in March 1996. The Standing Committee of the Attorneys-General had also approved provisions in the draft model bill and agreed to implement legislation in each state as soon as practicable. At present, four states enacted the new legislation.<sup>66</sup>

The Acts introduce the term 'Sea-carriage document' to cover bills of lading, sea waybills and ship's delivery orders. Moreover, the Acts have provisions on 'electronic and computerised sea-carriage documents' which are based on the UNCITRAL Model Law. The Bill Acts define the meaning of 'data message' exactly the same as in the Model Law. For example, Article 6 of the *Sea-Carriage Documents Act 1997 (NSW)* provides:

6. Electronic and computerised sea-carriage documents
  - (1) Subject to this section, this Act applies –

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<sup>64</sup> See Chapter V.

<sup>65</sup> Discussion Paper, 36.

<sup>66</sup> *Sea-Carriage Documents Act 1997 (NSW)*, *Sea-Carriage Documents Act 1997 (WA)*, *Sea-Carriage Documents Act 1998 (SA)*, *Sea-Carriage Documents Act 1998 (VIC)*.

- (a) in relation to a sea-carriage document in the form of a data message in the same way as it applies in relation to a written sea-carriage document.
- (b) in relation to the communication of a sea-carriage document by means of a data message in the same way as it applies in relation to the communication of a sea-carriage document by other means. ...

The *Carriage of Goods by Sea Amendment Act 1997* also modified provision of the *Carriage of Goods by Sea Act 1991* to incorporate a wider meaning of bills of lading to cover documents in electronic form as in the Sea-Carriage Documents Acts.

### Conclusions

It is concluded that, even though there are a number of rules that support the use of electronic bills of lading and also projects that actually operate electronic bills of lading in practice, there is still a lack of international confidence in the use of electronic bills. This is because one of the distinguishing features of international trade is that a large number of parties may be involved in a single shipment of goods. In addition to the buyer and the seller, contracts of carriage can easily bring in several banks in different countries, insurance companies, carriers, forwarders, port and customs authorities. Each of these parties may have a documentary requirement so that it is particularly difficult to devise a comprehensive EDI system as bills of lading.

In relation to electronic bills of lading, there remains a question whether a registry approach, such as the Bolero project, can work on more than a limited basis. However, the UNCITRAL Working Group on EDI considered that the work undertaken within the CMI, or the Bolero

project, was aimed at facilitating the use of EDI transport documents but did not, in general, deal with the legal effect of EDI transport documents.<sup>67</sup> Thus, particular attention should be given to the future work of UNCITRAL which could bring legal support to the new methods being developed in the field of 'electronic transfer of rights'.

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<sup>67</sup> The UNCITRAL Working Group on EDI, thirtieth session, 26 February-8 March 1996. p.3 (UN reference A/CN.9/WG.IV/WP.68 22 December 1995).

## CHAPTER VII

### MARINE CARGO LIABILITY REGIMES: AUSTRALIA AND ITS MAJOR TRADING PARTNERS

#### Introduction

Australia has an enormous reliance on sea carriage because of its geography. As an island country, Australia has no alternative but to use sea transport to carry its major exports and imports merchandise, such as coal and passenger motor vehicles. International shipping carried \$74 billion worth of goods to Australia's ports in 1994-95, and \$67 billion worth of exports from Australia's ports.<sup>1</sup>

Japan and the United States are major trading partners of Australia in term of export and import respectively.<sup>2</sup> Other Asian countries, especially the People's Republic of China, the Republic of Korea, and the ASEAN countries<sup>3</sup>, are also vital trading partners. Australia's growing links with Asia are emphasised by trends which show more than half its exports go to North and South-East Asia. This emphasis is also reflected in Australia's import trends, which show that North and South-East Asia account for 39.1 percent of total imports.<sup>4</sup>

In 1957 the group of nations now comprising the European Union (EU) were taking 51.3 percent of Australia's export trade and the countries comprising North and South-East Asia a total of 21.2 percent. In 1993-94, however, the proportion shipped to the EU had dropped to 11.3 percent

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<sup>1</sup> Cth of Aust., Bureau of Statistics, Year Book Australia 1996, 672.

<sup>2</sup> See Table 1. below.

<sup>3</sup> Association of Southeast Asian Nations comprised of Brunei, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

<sup>4</sup> See Cth of Aust., Dept. of Foreign Affairs and Trade, 'Australia's trade with Asia' in *Fact Sheet* (January 1995).

and those shipped to North and South-East Asia had grown to 58.6 percent.<sup>5</sup>

A key difference between Australia and its major trading partners in term of international shipping is that Australia is not a shipowning country. Australia is considered as a cargo owner, or a shipper, and largely uses overseas fleets for international voyages. In contrast, Australia's trading partners such as Japan, the U.S., and China are both cargo owner and shipowner countries. As a result, Australia expressed an intention to adopt the Hamburg Rules because the Rules provide a number of advantages to cargo owners. The intention of the Australian Federal Government to adopt the Hamburg Rules, however, produced an enormous debate on the issue.

This chapter, therefore, examines the present position of Australia in the international shipping industry. It is divided into two parts. In the first part, consideration is given to the present position of the Australian marine cargo liability regime. This examination also covers Australia's major trading partners including; Japan, the United States, China, Korea, and those countries in ASEAN. The second part involves a comparative study of existing marine cargo liability regimes, with a focus on important provisions of the Hague Rules and the Hamburg Rules.

## Part I

### International Marine Cargo Liability Regimes

#### Position of Australia

Australia's marine cargo liability regime was originally governed by the *Sea-Carriage of Goods Act 1904* (Cth). The Act was based on the United States' *Harter Act 1893*<sup>6</sup> and basically prevented carriers from contracting

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<sup>5</sup> *Ibid.*

<sup>6</sup> See the U.S. Position below at 225.

out of negligence in bills of lading. The Act implied a clause in bills of lading to the effect that, if the ship was seaworthy at the beginning of the voyage, the shipowner would not be liable for faults or errors in navigation.

In 1924, Australia passed the *Sea-Carriage of Goods Act 1924* which abolished the 1904 Act and regulated the extent to which ocean carriers are liable for loss or damage to cargo which occurs while it is in their keeping. This Act basically adopted the Hague Rules.

### **The *Carriage of Goods by Sea Act 1991* (Cth) and the *Carriage of Goods by Sea Amendment Act 1997* (Cth)**

At present, marine cargo liability in Australia is governed by the *Carriage of Goods by Sea Act 1991* (Cth), (COGSA), as amended by the the *Carriage of Goods by Sea Amendment Act 1997* (Cth). The COGSA provides that international and interstate carriage of goods by sea operate under the amended Hague Rules<sup>7</sup>, and the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (as amended by the Visby Protocol of 1968 and the SDR Protocol of 1979).<sup>8</sup>

By the time the COGSA was passed in 1991, Australia's cargo liability regime had become outdated and deficient. The *Sea-Carriage of Goods Act 1924* imposed very limited responsibilities for the safe care of cargo on ocean carriers when compared with other transport modes.<sup>9</sup> In 1984, the Insurance Council of Australia (ICA) requested that the Australian Government give consideration to the amendment of the *Sea-Carriage of Goods Act 1924* by incorporating the Visby and the SDR Protocols. The ICA pointed out that it was essential that the Act be amended as its outdated

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<sup>7</sup> *Carriage of Goods by Sea Act 1991* (Cth) Section 8.

<sup>8</sup> See Chapter I.

<sup>9</sup> Commonwealth of Australia, Department of Transport and Communications, 'Australian Marine Cargo Liability: A Discussion Paper' (Canberra 1987) [hereinafter Discussion Paper].

provisions were causing increasing problems, particularly as regards the cost of trade.<sup>10</sup>

In 1987, the Department of Transport and Communications presented a discussion paper on Australian marine cargo liability which proposed five options relevant to determining appropriate amendments to the *Sea-Carriage of Goods Act 1924*:

1. Stay with the *Sea-Carriage of Goods Act 1924*.
2. Accede to the Visby and the SDR Protocols.
3. Accede to the Hamburg Rules and introduce legislation which will activate those rules.
4. Unilaterally amend the *Sea-Carriage of Goods Act 1924* so as to adopt those provisions from either convention which appear to best suit national requirements.
5. Deregulate marine cargo liability by removing government intervention and allowing the issue of the allocation of liability to be determined by the commercial parties operating in a commercial environment.<sup>11</sup>

The second option was supported by shipowners and insurance representatives while shippers supported the third option, because under the Hamburg Rules carriers are substantially more liable for loss or damage to cargo in their charge. Moreover, the Visby and SDR Protocols updated the Hague Rules by increasing the liability limit for shipowners and replaced the gold standard with the modern IMF currency unit (Special Drawing Right or SDR), but they did not alter the inherent balance of liability between shippers and carriers.

The *Carriage of Goods by Sea Act 1991* (Cth) makes a compromise between those two options, because the Act accedes to the Visby and the SDR

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<sup>10</sup> B. Makins, 'Sea Carriage of Goods Liability: Which Route for Australia? The Case for the Hague Visby Rules and the SDR Protocol' (14th International Trade Law Conference, Canberra 1987) 27.

<sup>11</sup> Discussion Paper, 10.

Protocols and ensures that the Hamburg Rules provisions will be kept under review.<sup>12</sup>

Section 2 (2) of this Act provides that Part 3 and Schedule 2 (Application of the Hamburg Rules etc.) commence on a day to be fixed by Proclamation, being a day not sooner than the day on which the Hamburg Rules enter into force in respect of Australia. Section 2 (3) provides that if a proclamation under subsection (2) is not made within three years after the Act receives the Royal Assent, Part 3 and Schedule 2 commence at the expiration of those three years, unless, before that time, each House of the Parliament passes a resolution that they should be repealed or that the question of the repeal of these provisions should be reconsidered after a further period of three years.

It should be noted, however, that the Australian Government will not be moving to implement the Hamburg Rules until a sufficient number of Australia's major trading partners have adopted or expressed an intention to adopt them. As was stated in the second reading speech by the Minister for Land Transport (made in the Senate on 14 August 1991 and the House of Representatives on 15 October 1991):

The inclusion of the Hamburg Rules in the bill is a signal that Australia intends to accept this convention when its international standing is such that it can demonstrably provide a viable basis for new cargo liability arrangements for international sea-borne trade between Australia and its trading partners. ...

In other words, there will be no moves towards implementation until the Hamburg Rules have come into force internationally and a sufficient number of our major trading partners have adopted, or expressed an intention to adopt, the Hamburg Rules as the basis for their marine cargo liability regimes.<sup>13</sup>

In October 1994, the Australian Government chose not to proclaim the commencement of the Hamburg Rules and to reconsider action of the

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<sup>12</sup> *Carriage of Goods by Sea Act 1991* (Cth) Section 3.

<sup>13</sup> Cth of Aust., Weekly Hansard, House of Representatives No. 17, 1991 (14-17 October 1991) 1926.

question of the repeal of Part 3 and Schedule 2 after a further period of three years, until at least late 1997.<sup>14</sup> Following that decision, an industry Working Group was formed in 1995 in order to discuss those points that carriers, shippers, cargo insurers and ship owners could possibly agree on as a compromise before the Federal Government makes a reconsideration.

The Working Group's deliberations resulted in a package of suggested amendments to the *Carriage of Goods by Sea Act 1991* (Cth) which addressed the issues of documentation, duration of liability, coverage of importers, delay, deck cargo and arbitration. In addition, the package endorsed by industry proposes the repeal of Section 2 (3) of the Act in order to prevent a further debate.<sup>15</sup>

The industry-endorsed package of changes to Australia's cargo liability regime by the Working Group was considered by the Ministry of Transport as a sensible and workable compromise on what had been a very controversial issue for many years.<sup>16</sup> The Minister then asked for public comments on the proposed reform of the *Carriage of Goods by Sea Act 1991*. The reform package endorsed by the Minister has three components:<sup>17</sup>

- (a) amendment of the *Carriage of Goods by Sea Act 1991* to effect improvements to the operation of the current regime;
- (b) support in international forums for development of a modified marine cargo liability regime; and
- (c) removal of the Hamburg Rules trigger from the Act.

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<sup>14</sup> The decision was announced by the Minister for Transport on 12 October 1994. For more details on marine cargo liability rules in Australia and comments on the implementation of the Hamburg Rules see, for example; F. M. Hannah, 'Adoption of the Hamburg Rules in Australia and New Zealand' (1993) 9 MLAANZ J 33; and 'An Empirical Investigation of the Impact of the Adoption of the Hamburg Rules in Australia' a research paper prepared for the Australian Chamber of Shipping, July 1994.; Report of the Marine Cargo Liability Working Group (September 1995).

<sup>15</sup> Report of the Marine Cargo Liability Working Group, (September 1995).

<sup>16</sup> Cth of Aust., 'Media Statement' by Hon. J. Sharp MP Minister of Transport and Regional Development, (June 1996).

<sup>17</sup> Cth of Aust., Department of Transport and Regional Development, 'Improving Australia's Marine Cargo Liability Regime' Information Paper on measures to amend the *Carriage of Goods by Sea Act 1991* (July 1996) 2. [hereinafter Information Paper].

Consequently, in 1997 the Federal Government passed the *Carriage of Goods by Sea Amendment Act 1997*. The Amendment Act does not make any change to the Australian marine cargo liability regime but the Hamburg Rules trigger was repealed and substituted with more appropriate provisions. The Amendment Act provides that if, within 10 years of the commencement of section 2, the Minister has not tabled a statement in accordance with subsection 2A(4) setting out a decision that the amended Hague Rules should be replaced by the Hamburg Rules, Part 3 and Schedule 2, and section 2A, are repealed on the first day after the end of that 10 years.<sup>18</sup>

The Australian marine cargo liability regime is, therefore, under the amended Hague Rules. The Amendment Act also provides for the Minister to review the question of whether the amended Hague Rules should be replaced by the Hamburg Rules, from time to time while Part 3 and Schedule 2 have not commenced.<sup>19</sup>

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<sup>18</sup> *Carriage of Goods by Sea Amendment Act 1997* (Cth)

Schedule 1 - Amendment of the Carriage of Goods by Sea Act 1991

1 Subsections 2(2), (3), (4), (5) and (6)

Repeal the subsections, substitute:

(2) Subject to subsection (3), Part 3 and Schedule 2 commence as provided in section 2A.

(3) If, within 10 years of the commencement of this section, the Minister has not tabled a statement in accordance with subsection 2A(4) setting out a decision that the amended Hague Rules should be replaced by the Hamburg Rules, Part 3 and Schedule 2, and section 2A, are repealed on the first day after the end of that 10 years.

<sup>19</sup> *Carriage of Goods by Sea Amendment Act 1997* (Cth)

2 After section 2

Insert:

2A When Part 3 and Schedule 2 may commence

(1) The Minister must, from time to time while Part 3 and Schedule 2 have not commenced, review the question of whether the amended Hague Rules should be replaced by the Hamburg Rules.

(2) The first review must be completed within 5 years of the commencement of this section. Subsequent reviews must be completed within 5 years of the previous review. For this purpose, a review is completed when the tabling requirement in subsection (4) has been complied with.

(3) In conducting a review, the Minister must:

(a) consider the extent to which the Hamburg Rules have been adopted internationally, in particular by Australia's major trading partners; and

(b) consult with representatives of shippers, ship owners, carriers, cargo owners, marine insurers and maritime law associations on the question

### Position of Australia's Major Trading Partners

This part concerns marine cargo liability regimes of countries which are Australia's major trading partners. It examines the position of each country to see if there is a possible conflict with Australia's position. Australia's major exports for 1994-1995 and their principal markets were:<sup>20</sup>

1. coal, \$6,889 million (AUS\$ million) —10% of total exports: to Japan, the Republic of Korea, India and Taiwan;
2. non-monetary gold, \$4,820 million—7% of total exports: to Singapore, Japan and Republic of Korea;
3. beef, \$2,848 million—4% of total exports: to Japan, the USA, the Republic of Korea and Canada; and
4. iron ore, \$2,771 million—4% of total exports: to Japan, China and the Republic of Korea.

Australia's major commodity imports for 1994-1995 and their principal sources were:

1. passenger motor vehicles, \$4,353 million—6% of total imports: from Japan, Germany , the Republic of Korea and the United Kingdom;
2. computers, \$3,235 million—4% of total imports: from the USA, Singapore, Taiwan and Japan;
3. crude petroleum, \$2,475 million—3% of total imports: from Papua New Guinea, the United Arab Emirate, Saudi Arabia and Indonesia; and
4. telecommunication equipment, parts and accessories, \$2,184 million—3% of total imports: from the USA, Japan, Sweden and Germany.

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whether the amended Hague Rules should be replaced by the Hamburg Rules.

The Minister must then go on to decide in writing if the amended Hague Rules should be so replaced.

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Cth of Aust., Bureau of Statistics, *Year Book Australia 1996*, 680.

TABLE 1: Merchandise exports and imports by country 1994-1995 (AUS\$ million)<sup>21</sup>

Exports		Imports	
1. Japan	16 300	1. United States of America	16 046
2. Republic of Korea	5 282	2. Japan	12 777
3. New Zealand	4 780	3. Germany	4 861
4. United States of America	4 648	4. United Kingdom	4 439
5. Singapore	3 639	5. China	3 605
6. Taiwan	3 100	6. New Zealand	3 554
7. China	2 906	7. Taiwan	2 570
8. Hong Kong	2 630	8. Singapore	2 247
9. United Kingdom	2 271	9. Republic of Korea	2 028
10. Indonesia	2 105	10. Italy	2 026

It is worth mentioning that at present none of Australia's major trading partners have become contracting states of the Hamburg Rules or expressed an intention to adopt them. The present position of Australia's major trading partners are as follows.

TABLE 2: Position of Australia's Major Trading Partners

Country	Hague Rules	Hague-Visby	Hamburg Rules
1. Japan		X	
2. United States	X		*
3. Republic of Korea		Commercial Code	
4. New Zealand		X	
5. Singapore		X	*
6. Taiwan	X		
7. China		Maritime Code	Maritime Code
8. Hong Kong		X	
9. United Kingdom		X	
10. Indonesia		Commercial Code	

X Member

\* Signatory only

<sup>21</sup> Developed from Table 26.9 in *Year Book Australia 1996*, 673-675 (Source: *International Merchandise Trade: Australia*, June Quarter 1995 (5422.0) and unpublished data).

## The United States Position

The law governing ocean bills of lading<sup>22</sup> in the United States are; the *Harter Act 1893*<sup>23</sup>, the *Federal Bills of Lading Act 1916*<sup>24</sup>, (known as the 'Pomerene Bills of Lading Act'), and the *Carriage of Goods by Sea Act 1936*<sup>25</sup> (COGSA).

The U.S. marine cargo liability regime is governed by the Hague Rules. The Hague Rules are in force as domestic law by virtue of the enactment of the *Carriage of Goods by Sea Act 1936*. The U.S. is not a party to the Visby or SDR Protocols amending the Hague Rules. Nor is it a party to the Hamburg Rules.

### The Harter Act 1893

The *Harter Act 1893* was enacted to address the question of risk allocation for cargo damage between carriers and shippers. The major object of the Act was to prevent the misuse of the common law concept of freedom to contract that added shipowners' exemption clauses to bills of lading.<sup>26</sup> Section 1 of the Act made it unlawful for a shipowner or his manager, agent or master to insert in any bill of lading a clause exempting him or them, from liability for loss or damage to cargo caused by negligence, fault

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<sup>22</sup> The term 'Bill of Lading' as used in the United States refers not only to the traditional ocean bill of lading but also to a similar document issued in connection with carriage by road, rail, inland water, and even air. The Uniform Commercial Code § 1-201 (6) (1990) defines the terms as follows:

'Bill of Lading' means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. 'Airbill' means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

<sup>23</sup> Ch. 105, 27 Stat. 445 (1893), codified at 46 U.S.C. App. §§ 190-96 (1988).

<sup>24</sup> Approved August 29, 1916, as recodified in July 1994, 49 U.S.C. App. §§ 80101-80116 (1994).

<sup>25</sup> Ch. 229, 49 Stat. 1207 (1936), codified as amended at 46 U.S.C. App. §§ 1300-1315 (1988).

<sup>26</sup> See, for example, J.C. Sweeney, 'Happy Birthday, Harter: A Reappraisal of the Harter Act on its 100th Anniversary' (1993) 1 *J. Mar. L. & Com.* 1; and D. E. Murray, 'History and Development of the Bills of Lading' (1983) 37 *U. Miami L. Rev.* 689.

or failure in proper loading, stowage, custody, care or proper delivery.

Section 1 of the Act provides:

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Section 2 dealt with the unlawfulness of clauses reducing or avoiding the owner's obligation, or that of his master, manager, or agent, to exercise due diligence to make the vessel seaworthy, and to properly man, equip, provision and outfit the vessel. It provides that:

It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel, to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

#### The Carriage of Goods by Sea Act 1936 (COGSA)

The U.S. *Carriage of Goods by Sea Act 1936* enacts the Hague Rules with some modifications. It applies to every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States. The Act governs by force of law only 'the period from the time when the goods are loaded on to the time when they are discharged from the ship', known as the 'tackle to tackle' period. However, the shipper and the carrier may agree to extend the coverage to

the periods during which the carrier or its agent has custody before loading and after discharge from the ship.

#### The Federal Bills of Lading Act 1916 (Pomerene Bills of Lading Act)

The U.S. *Federal Bills of Lading Act 1916*, known as the Pomerene Bills of Lading Act, governs the relationship between the carrier and the person claiming an interest in the goods. Much of its text can be traced to the Uniform Bills of Lading Act, a uniform law approved in 1909 by the uniform law commissioners for adoption by individual states.

The Pomerene Act covers bills of lading issued by common carriers for carriage from the United States to a foreign country as well as for domestic interstate carriage. Thus, unlike the *Harter Act* and the *Carriage of Goods by Sea Act*, the Pomerene Act does not purport to govern bills of lading issued in a foreign country for carriage of goods to the United States.

#### The U.S. Proposed Amendment of the Carriage of Goods by Sea Act 1936

The proposal to amend the *Carriage of Goods by Sea Act 1936* (COGSA) is intended to bring the United States into line with the rest of the maritime nations.<sup>27</sup> At present, the U.S. COGSA differs from the requirements of the other nations that have adopted the Hague-Visby Rules. These nations comprise approximately 70% of the United States' sea trading partners.

The greatest distinction may be found in the package limitations. The United States COGSA limits the carrier's liability to \$500 per package or, for cargo not packaged, \$500 per customary freight unit. Hague-Visby limits the carrier's liability to 2 Special Drawing Rights of the International Monetary Fund (SDRs) per kilogram or 666.67 SDRs per package, whichever is greater. An SDR is now valued at about \$1.45. At this rate,

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<sup>27</sup> The Maritime Law Association of the United States, *Revising the Carriage of Goods by Sea Act*, (Document No. 727, May 3, 1996) 3. [hereinafter Revising COGSA]

the limit per kilo is \$2.90 and per package is \$966.67. In addition, the Hague-Visby Rules generally do not consider a pallet as a package while COGSA does.

In the early 1990's an informal working group was formed within the Committee on the Carriage of Goods of the Untied States Maritime Law Association (MLA), the purpose of which was to explore the possibility of reaching a commercial compromise for the domestic modernization of the U.S. COGSA.<sup>28</sup> The proposed revision would combine Hague-Visby and Hamburg into a unique text.

The MLA study group's proposal redefines the term 'contract of carriage' so that it includes negotiable or 'order' bills of lading and non-negotiable or 'straight' bills of lading, whether printed or electronic.<sup>29</sup> Under the present law, the carrier must issue a bill of lading on the demand of the shipper but, if the shipper agrees, the bill may be non-negotiable. The terms that must appear in the bill remain the same, and any attempt to disclaim or limit the carrier's statutory responsibilities and liabilities continues to be null and void. As revised, COGSA would apply not only to carriage to or from U.S. ports but also to carriage 'through' these ports.

In May 1996 the proposed changes to COGSA were approved by the MLA membership at the annual meeting. With the support of all U.S. maritime interests, the proposal is being offered to the U.S. government for adoption.<sup>30</sup>

The proposal retains the basic liability definition of the Hague-Visby Rules with the exception of the error of navigation or management defense. In

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<sup>28</sup> Revising the Carriage of Goods by Sea Act, the draft report of the Ad Hoc Liability Rules Study Group of the US Maritime Law Association (USMLA), October 4, 1993. Page 17 of that report refers to the point raised in the previous footnote, and pages 19-27 refer to changes to the existing US law of the type referred to in section 5 of the paper quoted from.

<sup>29</sup> Formal Report of the Committee on the Carriage of Goods reprinted in Maritime Law Association of the United States, Spring Meeting - May 6, 1994 at 10488. (Doc. No. 710) (1994).

<sup>30</sup> G. F. Chandler, 'Hamburg vs. Hague/Visby—The Need For Uniformity' Unpublished paper, (July 1996) 12-15.

exchange for the loss of error of navigation or management, the carrier receives more favorable burden of proof rules. Much of the original intent of the drafters of the Hague Rules, and thus COGSA, is retained by the proposal. The proposal would make the following changes:<sup>31</sup>

- I. List of Hague-Visby defenses will remain except error of navigation or management.
- II. Burden of Proof Rules will be changed to require all parties to bear an equal burden to prove which of more than one event combined to cause damage. The court would apportion liability amongst the parties responsible for the events in the same fashion as the court now apportions liability in collision and grounding cases.
- III. Package/Weight Limitation will be essentially the same as Hague-Visby.
- IV. Choice of Forum Clauses will be limited. The proposal will overturn *The Sky Reefer*, 115 S.Ct. 2322, 1955 A.M.C. 1817. It will not honor a choice of forum outside the United States for cargo shipped to or from the United States. If the choice of forum clause calls for arbitration outside the United States for cargo shipped to or from the United States, any party may move a United States court to order arbitration somewhere in the United States.
- V. Carrier issuing the bill of lading will be liable for entire carriage.
- VI. Shipper's Loan, Count and Weight Bill of Lading Clause will be honored in some circumstances.
- VII. The proposal will extend to the entire carriage evidenced by the bill of lading and to all parties participating in the performance of the carriage (except interstate trucking and rail carriers).

It is considered that the proposed bill builds on the *Carriage of Goods by Sea Act 1936* and the experience that has developed under it. In many respects, the existing law will remain unchanged. In other respects, the proposal simply restores U.S. law to the original understanding of the Hague Rules, rejecting inconsistent judicial doctrines that have departed from the internationally accepted intent. But even where genuine changes are proposed, the framework is that established by the Hague Rules and continued in the Hague-Visby Rules. The final result is a legal regime that

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<sup>31</sup> Revising COGSA, 3.

is not only better suited to the modern needs of the commercial world but is also closer than the 1936 COGSA (as currently applied) to the legal regimes in force in our major trading partners.

It should be noted that the significant modifications of the U.S. COGSA would be:<sup>32</sup>

1. The scope of coverage is proposed as receipt to delivery, rather than tackle to tackle. As before, all inbound and outbound cargoes would be covered, except that all movements by sea are included, rather than just international movements....
2. U.S. law has always provided a very broad definition of bill of lading, sufficient to cover non-negotiable documents, sea waybills, etc. through the *Pomerene Act of 1916* (Federal Bills of Lading Act, 49 U.S. Code § 80101-80116). This proposal would make such coverage explicit in COGSA, and provide for future innovation such as Electronic Data Interchange (EDI). To make COGSA more coherent in its procedures for bills of lading, sections of the Pomerene Act would be grafted to the proposed COGSA (with some updating to ensure that these sections did not conflict with ICC Paris' Uniform Custom and Practice (UCP500) and INCOTERMS.
3. On deck carriage would now be covered in recognition of containerization.
4. Nautical Fault would be eliminated, but the burden would be on cargo to prove error in navigation or management, should cargo attempt to counter any other category of exception which the carrier may present. The effect of *Schell v. The Vallescura*, 293 U.S. 296 (1934) in placing 100 percent of the loss or damage on the carrier, if the carrier is unable to precisely show the percentage of fault attributable to a cause for which it is liable versus a fault or faults for which it is not liable, is eliminated in favor of a comparative fault rule. Without the elimination of the rule in *Schell v. The Vallescura*, any degree of fault for error in navigation or management would have resulted in 100 percent of fault against the carrier.
5. Limitation would be exactly as in Hague-Visby. However, the 'breakability' of the limitation is tighter than in Hague-Visby, such that the conduct of the carrier must relate to foreseeable results.

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<sup>32</sup> See Revising the Carriage of Goods by Sea Act: Final Report of the Ad Hoc Liability Rules Study Group as Revised by the As Hoc Review Committee, February 1996.

6. The burden of proof for weight and count of cargo in containers would be clarified and tightened, which could necessitate some changes in marine cargo insurance coverage.

7. Parties to Service Contracts under the U.S. Shipping Act of 1984 (46 U.S. Code § 1700) would be provided increased freedom of contract regarding liability and limitation similar to charterparties.

8. Foreign jurisdiction clauses would be voided in favor of U.S. jurisdiction, and foreign arbitration clauses would be restricted to arbitration in the U.S.

9. The definition of a carrier would be extended to all parties performing functions for the contracting carrier (along the lines of New Zealand law) to eliminate the grey areas as to whom would be covered by Himalaya clauses.

It is considered that the overall effect of revising the Carriage of Goods by Sea Act would be to modernize the U.S. marine cargo liability regime and encourage sea carriage trade. Some commentators have suggested that if the proposed Carriage of Goods by Sea Bill is accepted in the U.S., the revised text could serve as a compromise international text acceptable to countries from both the Hague and Hamburg regimes.<sup>33</sup>

It should be noted, however, that there are many comments on the proposed amendment of the Carriage of Goods by Sea Act which express concern about the outcome of the proposal to amend COGSA. It is pointed out that the proposal departs much more from international norms and practice than the new laws of some countries such as China, Australia and New Zealand.<sup>34</sup> This is because the U.S. Senate Drafting Committee amended the original draft so that the text of the proposal was cut down by one third and used unfamiliar language and format. It is considered to be 'well-intentioned but complicated provisions'. For example, there are complicating definitions of three types of 'carrier', namely: 'contracting

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<sup>33</sup> See, P&O Containers, *The Merchants Guide: A Guide to Liabilities and Documentary Problems* 49 (J.W. Richardson ed., 1st int'l ed. 1994) ("If the U.S. does adopt these revisions it is not impossible that other nations may see them as an acceptable compromise between the Hague-Visby and Hamburg Rules and follow the U.S. lead").

<sup>34</sup> William Tetley, '*Law Conventions Trampled: US COGSA Sails Its Own Quirky Course*'; *Fairplay Magazine* (Oct. 1998) [<http://www.admiraltylaw.com/tetley/usmlacog.htm>] (Mar. 1999).

'carrier', 'performing carrier' and 'ocean carrier'.<sup>35</sup> There are also complicated rules on burden of proof for various carriers amongst themselves and toward consignees and shippers.<sup>36</sup>

At present, the proposal to amend COGSA is under consideration of a committee of the U.S. Senate.<sup>37</sup>

## Japan

The cargo liability regime in Japan is governed by the Hague-Visby Rules. In fact, Japan had moved from the Hague Rules to the Hague-Visby Rules in mid-1993. The Japanese *Carriage of Goods by Sea Act 1957* was amended by the Law of 3rd June 1992 to incorporate substantial provisions of the Hague-Visby Rules and the SDR Protocol. It came into force on 1st June 1993. And by way of supplement, the Commercial Code of Japan also governs the international sea carriage.<sup>38</sup>

The Japanese legislation predominantly paraphrases the Hague-Visby Rules. However, it also includes major differences from the Convention. These include:

1. carrier liability to commence upon receipt of goods and extend through loading, stowage, carriage, discharge, and delivery of goods, and
2. carrier responsibility for the delayed arrival of goods.

The provisions dealing with the extended period of carrier liability was first introduced in the *Carriage of Goods by Sea Act 1957*. The carrier liability was extended from 'tackle to tackle' to cover the period from receipt through to delivery of the goods. This has been preserved in the *Carriage of Goods by Sea Act 1992*. Article 3 provides:

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<sup>35</sup> See Section 2 of the U.S. Carriage of Goods by Sea Bill 1998.

<sup>36</sup> More comments on the U.S. Carriage of Goods by Sea Bill will be discussed below in this Chapter.

<sup>37</sup> The proposed Carriage of Goods by Sea Bill is available at [<http://www.admiraltylaw.com/tetley/senate4c.htm>] (Mar. 1999).

<sup>38</sup> A.N. Yiannopoulos, (ed.) *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems* (1995) 217.

The carrier shall be liable for the loss, damage or delayed arrival of the goods which is caused by his own or his servant's negligence for the receipt, loading, stowage, carriage, custody, discharge and delivery of such goods.<sup>39</sup>

The main change in this article was to extend carrier responsibility for delayed arrival of goods. Article 3 also differs by referring specifically to negligence rather than more generalised rules of liability.

The limitation of liability under the Japanese *Carriage of Goods by Sea Act* 1992 applies to the carrier, the carrier's servant and/or employees including the master, crews, pilot, etc. However, it does not apply to independent contractors, such as terminal operator and stevedores who operate their own works independently from carrier's control.

The marine cargo liability regime in Japan is, therefore, not much different from Australia's regime. It should be noted, however, that the Japanese Government has shown no sign or intention of adopting the Hamburg Rules. The Japanese *Carriage of Goods by Sea Act* 1992 does not have any provision on the implementation of the Hamburg Rules as in the *Carriage of Goods by Sea Act* 1991 (Cth).

## New Zealand

The *Maritime Transport Act* 1994 has recently become law in New Zealand. Many sections of the Act came into force on 1 February 1995. The Act replaces the *Sea Carriage of Goods Act* 1940. It will have a profound effect on the regulation of maritime activity in the country, including; marine pollution, and international and domestic trade. Its marine cargo liability provisions essentially incorporate the Hague-Visby Rules.<sup>40</sup>

The bill of lading reform in the new Act is broadly the same as in the U.K. *Bills of Lading Act* 1992. The New Zealand statute seeks to remedy some of the deficiencies of the old bill of lading legislation and to remove the

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<sup>39</sup> The Japanese *Carriage of Goods by Sea Act* 1992, Art. 3.

<sup>40</sup> The New Zealand *Maritime Transport Act* 1994, Part XVI.

problem concerning the status of sea waybills and ship's delivery orders. One principal change in relation to marine cargo liability is that the Act applies the Hague-Visby Rules to all outward voyages from New Zealand. Thus, New Zealand is now placed in line with most of its trading partners. The debate as to whether the Hamburg Rules are to be adopted is also a major issue of New Zealand interest. The *Maritime Transport Act 1994*, however, had no trigger application to implement the Hamburg Rules as in Australia's *Carriage of Goods by Sea Act 1991*.

A large number of New Zealand shippers have indicated support for the Hamburg Rules, and the New Zealand government considers that the Hamburg Rules would serve New Zealand's interests better than other carrier liability rules. However, the New Zealand Government decided that it would not move to accept the Hamburg Rules at this stage, but would keep the situation under review. New Zealand would analyse the situation further, in terms of costs and benefits of acceptance, the attitude of trading partners, and the legal and commercial implications.<sup>41</sup>

### **United Kingdom**

The U.K. marine cargo liability regime is based on the *Carriage of Goods by Sea Act 1992*, which basically applies the Hague-Visby Rules as amended by the SDR Protocol of 1979. The Act replaced the *Bills of Lading Act 1855* and the *Carriage of Goods by Sea Act 1971*. The U.K. approaches in the new Act are to eliminate problems concerning title to sue under the *Bills of Lading Act 1855*, and to incorporate provisions to cover sea waybills and ship's delivery orders as well as the use of electronic bills of lading.<sup>42</sup>

Provisions on carrier liability, such as nautical fault, period of liability, time bar, and monetary limitation primarily follow the Hague-Visby Rules. Thus, the U.K. position is not different from Australia's. Moreover, Australia has followed the U.K. approach to reforming bill of lading legislation in relation to the above mentioned issues.

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<sup>41</sup> Report of the Marine Cargo Liability Working Group, (September 1995) 33.

<sup>42</sup> See the discussion in Chapter II and Chapter VI.

At present the United Kingdom has no plans for adopting the Hamburg Rules.

### People's Republic of China

In an attempt to follow those principles recognized internationally in the shipping world, China enacted its new maritime legislation in 1993. The Chinese Maritime Code came into force from July 1, 1993. It was considered as a revolutionary document, not because of what it contains but considering the way it was developed. It is the first Chinese law to draw on the legal experience of other countries and from international agreements.<sup>43</sup> It is reported to resemble the codes of European countries rather than the detail of English shipping legislation and includes elements of many international conventions including the Hague-Visby Rules, the Multimodal Transport Convention 1980, the International Convention on Salvage 1980 and the York Antwerp Rules 1974.<sup>44</sup> The Code aims to provide a comprehensive and modern legal framework for trade involving Chinese international shipping and freight forwarding companies.

The Chinese Maritime Code is a concise piece of legislation which contains in 15 chapters, (comprising 278 articles), laws relating to ships, crew, contracts of carriage by sea, charterparties, towage, collision, salvage, general average, limitation of liability and marine insurance. Although China has neither ratified nor adhered to the Hague Rules, the Hague-Visby Rules and the Hamburg Rules, its marine cargo liability provision draws principally on the Hague-Visby Rules, and also incorporates some concepts from the Hamburg Rules such as the limitation of carriers' liability.<sup>45</sup> The pertinent provisions of the new Maritime Code are as follows.

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<sup>43</sup> W. Michael and F. G. Quing, 'Understanding the new Chinese Maritime Code' Reuter Textline, Lloyds List, April 12, 1995.

<sup>44</sup> Report of the Marine Cargo Liability Working Group, (September 1995) 35.

<sup>45</sup> The People's Republic of China Maritime Code 1993, Chapter 4. For general comments on the Code see, for example; Y. Dongnian, *et al.*, 'The Characteristics of the Law of Contract Relating to Carriage of Goods by Sea of the Chinese

1. The law adopts the Hamburg definitions of carrier, to include both contracting carrier and the actual carrier.<sup>46</sup>

2. Modified from the Hamburg Rules, the carrier has responsibility over goods in containers from the time of receiving the goods at port, until the goods are delivered at the port of discharge. With non-container goods, the carrier is responsible from the time of loading until the time of unloading, derived from the Hague-Visby Rules.<sup>47</sup>

3. The carrier is liable to the shipper for delay as per Hamburg, but damages are limited to the (actual) freight payable for the goods delayed.<sup>48</sup>

4. Following the SDR Protocol of Hague-Visby, the carriers' liability for loss or damage to goods is 666.67 SDR, or 2 units of account per kilogram, whichever is higher.<sup>49</sup>

5. The twelve defenses to carrier liability are maintained in the new Chinese code, derived from the seventeen exceptions of the Hague Rules. Notwithstanding, as provided in the Hamburg Rules, the carrier shall bear the burden of proof for these defenses.<sup>50</sup>

6. The carrier is liable for loss or damage to deck cargo, unless the shipper had contractually agreed to deck carriage beforehand. This provision is derived from Article 9 of the Hamburg Rules.<sup>51</sup>

Article 268 of Maritime Code of China provides:

If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the

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Maritime Code, 1993' Conference Materials for the International Conference on Maritime Law (1994); L. Zhang, 'Shipping Law and Practice in China—Legal Analysis of the Draft Maritime Code and Maritime Jurisdiction' (1990) 14 *Mar. Law.* 209; W. Tetley, *International Conflict of Laws: Common, Civil and Maritime* (1994) 1076-1079; W. Michael and F. G. Quing, *op. cit.*; and R. M. Samuel, 'Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions' (1996) 23 *Transp. L. J.* 479.

<sup>46</sup> Chinese Maritime Code, Art. 42.

<sup>47</sup> *Id.*, Art. 46.

<sup>48</sup> *Id.*, Art. 50, 57.

<sup>49</sup> *Id.*, Art. 56.

<sup>50</sup> *Id.*, Art. 51.

<sup>51</sup> *Id.*, Art. 53.

provisions are ones on which the People's Republic of China has announced reservations.

International practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions.

Package limitation is 666.67 units of account per package or 2 units of account per kilogram according to Article 56 of MCC. 'Units of Account' above-mentioned means SDR in figures according to Article 277 of MCC.

The compensation for loss of the cargo shall be based on actual value of the cargo, which is CIF value according to the Maritime Code of China. However, a deduction shall be made if there is anything that should have incurred but have been omitted due to the loss of the cargo.

The compensation for damage of the cargo shall be based on the difference of the actual value of the cargo before and after the damage, or on the repair costs.

### **Republic of Korea**

The Korean Commercial Code<sup>52</sup> has provisions governing carriage of goods by sea in Chapter IV: CARRIAGE, Article 780-820. Although Korea did not ratify the Hague Rules or the Hamburg Rules, the revised Commercial Code, which came into force in 1993, had mainly and basically adopted the Hague-Visby Rules as well as the SDR and also incorporated some points of the Hamburg Rules. The liability for the compensation for damage of sea carriage of goods was regulated by the principle of limited and faulty liability within the revised Law of 1991.

The significant provisions relating to the Korean marine cargo liability regime can be summarised as follows:

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<sup>52</sup> Korean Commercial Code 1962 as amended by Law No. 1212 Dec. 1962, Law No. 3724, Apr. 1984 and Law No. 4470, Dec. 1991. See Appendix 3.

1. Basis of liability is the carrier's due care for the vessel being seaworthy.<sup>53</sup>

2. Charging the person who assumes principal liability with respect to the carriage of goods from the shipowner to carrier, to avoid problems where a charterer, concluding a contract for carriage of goods as a carrier, was classified as a shipowner.

3. The liability for compensation for damages of the carrier is restricted to the maximum on the amount of 500 unit account (SDR) per package or shipping unit of the goods, except in case where such damages to the goods are caused intentionally by the carrier, or any action or omission done imprudently by the carrier in the knowledge that such damage might be caused.<sup>54</sup>

4. Application to non-contractual claim is added into the revised Code. Provisions concerning the liability of the carrier will also apply to the liability for compensation for damages caused by any unlawful act of the carrier.<sup>55</sup> In case where a claim is made against an employee or agent of the carrier, such employee or agent may invoke a plea or restriction of liability for which the carrier may claim if the damages are caused in connection with the performance of his or her duties. This provision is similar to Article 7 of the Hamburg Rules.

Consequently, there is now little difference in the basic structure of the limitation of carrier's liability between the Korean Commercial Code and the Hague-Visby Rules. However, it is suggested that the changes to the Commercial Code have produced a code that is identifiable with other maritime conventions and current shipping trends.

## Singapore

Singapore is governed by the Hague-Visby Rules regime as a result of the adoption of the Rules in its *Carriage of Goods by Sea Act 1985*. Section 3 of the Act provides that the Rules have effect in relation to and in

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<sup>53</sup> Korean Commercial Code, Art. 787.

<sup>54</sup> Korean Commercial Code, Art.789-2.

<sup>55</sup> Korean Commercial Code, Art 789-3.

connection with the carriage of goods from any port in Singapore to any other port whether in or outside Singapore.

The *Carriage of Goods by Sea Act 1985* modified two issues under the Hague-Visby Rules in relation to local trade and bulk cargoes. Firstly, the modification of Article VI of the Hague-Visby Rules in relation to local trade was added to the Act so that its provisions apply to domestic carriage. Section 6 provides that:

6. Article VI of the Rules has effect in relation to—
  - a) the carriage of goods by sea in sailing ships carrying goods from any Singapore port to any other port whether in or outside Singapore; and
  - b) the carriage of goods by sea in ships carrying goods from any port in Singapore to any port in Singapore or to any port in Malaysia, as though the Article referred to goods of any class instead of to particular goods and as though the provision to the second paragraph of the Article were omitted.

Secondly, the Hague-Visby Rules Article III Rules 4 and 5 were modified in relation to bulk cargoes. The modification in Section 7 provides:

7. Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be *prima facie* evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

Apart from these modifications, the Singapore *Carriage of Goods by Sea Act 1985* is no different from the Hague-Visby Rules. It should be noted, however, that Singapore did not ratify or adopt the SDR Protocol in the Act. Thus, the monetary limitation of carrier's liability differ from the Rules. It is set at S\$1,563.65 per package or S\$4.69 per kilo of gross weight of lost or damaged cargo, whichever is higher.

## Hong Kong

The marine cargo liability regime in Hong Kong is governed mainly by two pieces of legislation; the *Carriage of Goods by Sea Ordinance*<sup>56</sup> and the *Bill of Lading and Analogous Shipping Documents Ordinance*.<sup>57</sup> The *Carriage of Goods by Sea Ordinance* regulates liability in respect of the carriage of goods by sea and adopted the Hague Rules, (as amended by the Visby and SDR Protocols). The *Bill of Lading and Analogous Shipping Documents Ordinance* replaced the old Bills of Lading Ordinance with new provisions with respect to bills of lading and other shipping documents.<sup>58</sup>

Section 3 of the *Carriage of Goods by Sea Ordinance* provides:

3. Application of Hague Rules as amended

(1) Subject to subsection (3) the Rules as set out in the Schedule shall have the force of the law.

(2) The Rules shall also apply to the carriage of goods by sea in ships where the port of shipments is in Hong Kong, whether or not the carriage is between ports in 2 different States within the meaning of Article X.

(3) Nothing in this section shall be taken as applying anything in the Rules to any contract for the carriage of goods by sea, unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title ....

The monetary limitation of carrier's liability under the Hague-Visby Rules as amended by the SDR Protocol is set at 667 units of accounts per package or unit or 2 unit of accounts per kilogram of the goods lost or damaged, whichever is the higher. However, the Hong Kong Monetary Authority may specify in Hong Kong dollars the respective amounts which are to be taken as equivalent for a particular day of the sums expressed in special drawing rights in Article IV of the Hague-Visby Rules.<sup>59</sup>

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<sup>56</sup> *Carriage of Goods by Sea Ordinance*, Ordinance No.102 of 1994.

<sup>57</sup> *Bill of Lading and Analogous Shipping Documents Ordinance*, Ordinance No. 85 of 1993.

<sup>58</sup> The new law introduces similar changes into Hong Kong maritime legislation to those introduced in to English law by the *Carriage of Goods by Sea Act 1992* (UK).

<sup>59</sup> Supra note 16, Section 7. Conversion of special drawing rights.

## Taiwan

At present, Taiwan is governed by the Hague Rules regime. The Taiwanese Maritime Law<sup>60</sup>, promulgated in 1929 and amended in 1962, has ten chapters dealing with all aspects of maritime law including collision of ships and marine insurance. The law provides, in Chapter V, provisions on contracts of carriage and bills of lading which are similar to bills of lading legislation in the United States.

Article 105 In the event that a contract of carriage or bill of lading contains a clause, covenant or agreement relieving the carrier or shipowner from liability for damage or loss of goods resulting from fault non-fulfilment of obligations required to be fulfilled as stipulated in this Chapter, such clause, covenant or agreement shall be invalidated.

Article 106 A carrier or shipowner, prior to and at the time of commencement of the voyage, shall effect due diligence and arrangements with respect of the following:

1. To make the ship possess capability of navigation safely;
2. To properly man, equip and supply the ship;
3. To make the holds, refrigeration and cool chambers, and all other parts of the ship provided for carriage of goods, fit for reception, carriage and preservation.

A carrier is not liable for indemnity against the damage or loss resulting from sudden loss of capability of navigation to the ship after commencement of the voyage.

The burden of proof shall rest with the carrier or shipowner when he makes contention to exempt himself from the liability under the preceding paragraph.

Article 107 A carrier shall exercise due diligence and discretion with respect to the loading, unloading, handling, stowage, custody, carriage, care and keeping of the goods undertaken to be carried.

## Philippines

The Philippines marine cargo liability regime is similar to the position of the United States, that is to say under the Hague Rules regimes by

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<sup>60</sup> The Taiwanese Maritime Law promulgated on December 30, 1929 and effective from January 1, 1931. The Law was amended on July 25, 1962.

following the U.S. *Carriage of Goods by Sea Act* 1936 (COGSA). When the U.S. enacted COGSA, the political status Philippines was a Commonwealth Government and was a territory of the U.S. and the Philippines therefore accepted the U.S. COGSA through the *Carriage of Goods by Sea Act* (Com. Act No. 65), approved on April 22, 1936.<sup>61</sup> The Act provides:

Section 1 That the provisions of Public Act No. 521 of the 74th Congress of the United States, approved on April 16, 1936, be accepted, as it is hereby accepted to be made applicable to all contracts for carriage of goods by sea to and from Philippine ports in foreign trade: Provided, that nothing in this Act shall be construed as repealing any existing provision of the Code of Commerce which is now in force, or as limiting its application.

With regard to the Philippines Civil Code,<sup>62</sup> contracts for the carriage of goods by sea from the Philippines to a foreign country will be governed by the law of such foreign country.<sup>63</sup> Contracts for carriage of goods by sea from an overseas country to the Philippines will be under the Civil Code Article 1766. In the case where there is no applicable provision in the Civil Code, the Code of Commerce and other special laws, such as the *Carriage of Goods by Sea Act*, will govern.

The monetary limitation of carrier's liability under the Philippines Carriage of Goods by Sea Act is US\$500 per package.

At present, the Philippines Government has no plan to move from the Hague Rules regime to Hague-Visby or Hamburg Rules. It is most likely, however, that the Philippines will follow any change in the U.S. bills of lading legislation as mentioned above.

## Thailand

Thailand is not a signatory either the Hague Rules or the Hamburg Rules. Before 1991 the marine cargo liability regime in Thailand was governed by

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<sup>61</sup> See Agbayani, *Commercial Laws of the Philippines* 4 (1992) 617-618.

<sup>62</sup> The New Civil Code was adopted on August 30, 1950.

<sup>63</sup> *Id.*, Art. 1753.

the Civil and Commercial Code. However, the Code had only a general provision stating that the carriage of goods by sea was governed by the Laws and Regulations relating thereto,<sup>64</sup> and at that time Thailand had no legislation or regulation relating to international carriage of goods by sea. Thus, Thai courts had to use general provisions on 'Carriage of Goods'<sup>65</sup> of the Civil and Commercial Code and customary rules and practices.

In 1991, the Thai government enacted the *Carriage of Goods by Sea Act B.E. 2534* to provide specific laws governing sea carriage, and bring its carriage of goods by sea legislation up to an international standard. The Act mainly incorporated provisions of the Hague-Visby Rules, while some of the Hamburg Rules concepts were also adopted into the Act. The reason for combining of the two conventions into the Act is that Thailand is a very small shipping nation and still has to rely on foreign shipping services. Therefore, the new Carriage of Goods by Sea Act has the main object of protecting the shippers, Thai exporters, and balances liability between the shippers and carriers.

The main provisions of the Act are as follows:

1. The Act applies to carriage of goods by sea both import to and export from Thailand. There is an exception where it is provided in the bill of lading that the law of the other country or international law will apply, then that law will apply to such a carriage.<sup>66</sup> Section 5 provides that the Act will not apply to carriage of goods by sea under a charter party whether as a whole or part of the ship chartered. But if a bill of lading is issued covering the goods carried under a charter party, the relationship between the carrier and the consignee who is not the charterer will be governed by the Act.

2. Limitation of liability of the carrier for damages resulting from loss of or damage to goods is limited to an amount of 10,000 baht (the

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<sup>64</sup> *Civil and Commercial Code* Art. 609.

<sup>65</sup> *Id.*, Art. 610 - 633.

<sup>66</sup> *Carriage of Goods by Sea Act 1991* Art. 4.

equivalent of AUS\$500) per shipping unit or 30 baht (AUS\$1.5) per kilogramme of net weight of the goods, whichever is the higher.<sup>67</sup>

## Part II

### Aspects of Marine Cargo Liability Regimes

#### **Marine Cargo Liability Debate**

Part I above examines the present position of Australia and its major trading partners. The following part analyses important aspects of the different liability regimes and their effects on the international shipping industry. This analysis is based on a comparison of the Hague Rules as amended by the Visby and SDR Protocols (the amended Hague Rules) and the Hamburg Rules.

It should be noted that arguments for and against the Hamburg Rules drew an attention to the following issues; scope of application, basis of liability and exemptions, and monetary limitation of carriers' liability.<sup>68</sup> These key issues will create an enormous impact on ocean transport of a country if that country adopts the Hamburg Rules. The actual advantages and disadvantages of the Hamburg Rules, however, cannot be clearly pointed out because the Rules have only entered into force internationally within the last six years and none of the major shipping nations has adopted them. There is no substantial evidence at international level to illustrate support for the Hamburg Rules. As a result, many countries have shown both enthusiasm and caution about implementing the Rules, for example, Australia and New Zealand.

The arguments put forward in favour of the Hamburg Rules mainly focus on the implementation of the Rules having a number of advantages for shippers because they have a wider scope than that applying to import and

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<sup>67</sup> *Id.*, Art. 58.

<sup>68</sup> See a full comparision of the Hague and Hamburg Rules in Chapter I.

export carriages, and they also apply to other documents apart from traditional bills of lading. The Rules amend the current imbalance in the relative bargaining positions of shippers and carriers, particularly in relation to the nautical fault defence. Moreover, they address and overcome a number of the obvious defects inherent in the amended Hague Rules which operate against the interests of shippers.

It is considered that the Hamburg Rules offer true legal advantages for the cargo-owning while the Hague-Visby Rules contain out of date provisions for ship-owners and carriers, and do not adequately provide for modern developments in the shipping industry such as containerisation. They also do not provide at all for such developments as electronic data interchange and electronic bills of lading.

As noted in Part 1, apart from countries which have adopted the Hamburg Rules as a whole, some countries, such as People's Republic of China and Thailand, have adopted, (and some countries, notably the U.S., are contemplating adopting) elements of the Hamburg Rules which apparently represent advantages for shippers. These apparently advantageous elements of the Hamburg Rules for shippers are:

- (a) the freer documentation requirements under those Rules;
- (b) the wider geographic and time coverage provided for under those Rules;
- (c) the deletion of out-dated or inappropriate defences for ship-owners and carriers;
- (d) some useful wider definitions, particularly for the term 'goods';
- (e) the increased per package or per kilo liability; and
- (f) the change to the overall basis of liability to bring it into line with other carriage regimes, and into line with modern developments in liability law generally.

In contrast, the arguments against the Hamburg Rules draw attention to the success of the Hague Rules. The Hague Rules as amended by the two Protocols are acknowledged as one of the most successful international conventions. Since their adoption in 1924, the Rules have been adopted by most of maritime trading nations and have been accepted by cargo and

ship owning interests. The coverage of the amended Hague Rules is wider than is indicated by the number of contracting countries because normally most bills of lading issued by shipowners in other countries voluntarily incorporate the Hague Rules. The amended Hague Rules have produced a high degree of world uniformity in the carriage of goods and have provided consignees, indorsees and financiers with the certainty necessary to protect the credit of the bill of lading as an instrument of international trade.<sup>69</sup>

#### **Effect of the *Carriage of Goods by Sea Amendment Act 1997 (Cth)* and Position of Australia**

Since the *Carriage of Goods by Sea Act 1991 (Cth)* came in force, the effects of the Act on the overall Australian marine cargo liability regime cannot yet be clearly seen. However, it should be mentioned that this Act does not change the balance of liability between carriers and shippers. The reason is that the Act adopted the amended Hague Rules which increased liability limits and clarified the meaning of 'package or unit' but did not change the basis of carrier's liability.

It should be noted that the *Carriage of Goods by Sea Act 1991* does not affect the operation of the *Limitation of Liability for Maritime Claims Act 1989 (Cth)* which gives the force of law in Australia to the *Convention on the Limitation of Liability for Maritime Claims 1976*. This means that shipowners can limit their total liability from all claims of a certain nature arising on any distinct occasion including claims of loss of life or personal injury, or loss of or damage to property occurring on board or in direct connection with the operation of the ship. Moreover, this Act prevails over the relevant provision of the *Trade Practices Act 1974*<sup>70</sup>to the extent

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<sup>69</sup> A more detailed account for the Hamburg Rules debate is available on the Internet at the Uniserve Law site at the Australian National University. See for example, 'Arguments for and against the Hamburg Rules' — A collection of Papers on the 'International Commercial Law' homepage [<http://uniserve.edu.au/law/pub/icl/material.html#TransportContracts>] (Mar. 1999).

<sup>70</sup> *Trade Practice Act 1974* Part 5.

of any inconsistency. This will remove the potential for action to be taken against an ocean carrier under the consumer protection provisions of the *Trade Practices Act* in respect of loss or damage to cargo by a shipper who is not normally in the business of cargo shipping.<sup>71</sup>

#### Effect of the *Carriage of Goods by Sea Amendment Act 1997* (Cth)

By enacting the *Carriage of Goods by Sea Amendment Act 1997* (Cth), Australian marine cargo liability regime is considered to be under the amended Hague Rules with some improvements. This is because the Amendment Act merely repealed the Hamburg Rules trigger provision and substituted more appropriate provisions. This means that the Hamburg Rules will not automatically come into force in Australia on a given date provided by the Act. However, the Rules will commence only if the Minister decides that the amended Hague Rules should replaced by the Hamburg Rules.<sup>72</sup> Consequently, the Hamburg Rules are kept under review of the Government for another 10 years.

However, the more important effect of the Amendment Act is that it provides for the regulations to modify Schedule 1 (the amended Hague Rules) in order to update the amended Hague Rules for the following purposes:

- (a) to provide for the coverage of a wider range of sea carriage documents (including documents in electronic form);
- (b) to provide for the coverage of contract for the carriage of goods by sea form places in countries outside Australia to places in Australia in situations where the contracts do not incorporate, or do not otherwise have effect subject to, a relevant international convention;
- (c) to provide for increased coverage of deck cargo;
- (d) to extend the period during which carriage may incur liability;
- (e) to provide for carriers to be liable for loss due to delay in circumstances identified as being inexcusable.<sup>73</sup>

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<sup>71</sup> Cth of Aust., Weekly Hansard, *op cit.*, 1927.

<sup>72</sup> Supra note 19-20.

<sup>73</sup> *Carriage of Goods by Sea Amendment Act 1997* (Cth).

Following the enactment of the *Carriage of Goods by Sea Amendment Act* 1997 the Federal Government passed the *Carriage of Goods by Sea Regulations 1998* which came into force on 1 July 1998.<sup>74</sup> These Regulations modified Schedule 1 (the amended Hague Rules) for the purposes above mentioned. At present, the Australian marine cargo liability regime has been improved in the following aspects.

1. coverage of a wider range of sea carriage documents;
2. coverage of importers;
3. coverage of deck cargo;
4. duration of liability;
5. liability for loss due to delay.

A major modification which significantly improves the *Carriage of Goods by Sea Act 1991* (Cth) is that the amended Act covers all relevant shipping

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## Section 7

Repeal the section, substitute:

### 7 The amended Hague Rules

- (1) The *amended Hague Rules* consists of the text set out in Schedule 1, as modified in accordance with the Schedule of modifications referred to in subsection (2). The text set out in Schedule 1 (in its unmodified form) is the English translation of Article 1 to 10 of the Brussels Convention, as amended by Article 1 to 5 of the Visby Protocol and Article II of the SDR Protocol.
- (2) The regulations may amend this Act to add a Schedule (the *Schedule of modifications*) that modifies the text set out in Schedule 1 for the following purposes:
  - (a) to provide for the coverage of a wider range of sea carriage documents (including documents in electronic form);
  - (b) to provide for the coverage of contract for the carriage of goods by sea from places in countries outside Australia to places in Australia in situations where the contracts do not incorporate, or do not otherwise have effect subject to, a relevant international convention (see subsection(6));
  - (c) to provide for increased coverage of deck cargo;
  - (d) to extend the period during which carriage may incur liability;
  - (e) to provide for carriers to be liable for loss due to delay in circumstances identified as being inexcusable.

The modification do not actually amend the text set out in Schedule 1, however, the text has effect for the purposes of this Act as if it were modified in accordance with the Schedule of modifications. ...

<sup>74</sup> *Carriage of Goods by Sea Regulations 1998* (Statutory Rules 1998 No.174) and *Carriage of Goods by Sea Regulations 1998* (No.2) (Statutory Rules 1998 No.324).

documents both negotiable and non-negotiable, including electronic documents. The Act provides for the coverage of a wider range of contracts of carriage, including the various types of non-negotiable documents (sea waybills, ship's delivery orders) as well as bills of lading. This is essentially a Hamburg Rules reform. The application of the Hague-Visby Rules is expressly limited to contracts of carriage covered by a bill of lading or any similar document of title, whereas the Hamburg Rules extend to any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another.

The second aspect of the amended Act is that the Act applies where the contract of carriage does not incorporate any international convention. Thus, importers' contracts of carriage shall be covered by the international convention in force in the Act. Specifically, the Act was amended by the introduction of a provision applying the Hague-Visby Rules to a contract of carriage by sea from any place outside Australia to any place in Australia which does not incorporate in its terms a standard of carrier liability at least equivalent to that of the Hague Rules.

Thirdly, deck cargo is covered by the liability regime provided that, no later than the time of booking, the specific stowage requirements of the shipper have been notified to and agreed by the carrier. It should be noted that under the Hague-Visby Rules, deck cargo is specifically excluded from the definition of 'goods'.<sup>75</sup> By contrast, the Hamburg Rules make special provision for deck cargo, whereby the carrier is only entitled to carry goods on deck if there is a specific agreement with the shipper to that effect. If goods are carried on deck without such agreement, the carrier will be liable for any resulting loss of or damage to the goods (as well as for delay in delivery). The amended *Carriage of Goods by Sea Act* recognises that excluding deck cargo from the liability regime is inappropriate in modern shipping, especially in the context of containerized trades.

The amended *Carriage of Goods by Sea Act* extends carrier liability to the period during which the cargo is in the carrier's care within the limits of

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<sup>75</sup> The Hague-Visby Rules, Art. 1 (c).

the wharf or terminal at the ports of loading and discharge. Under the original text of the Hague-Visby Rules, the period of the carrier's responsibility was restricted to 'tackle-to-tackle', from the time when the goods were loaded on to the time they were discharged from the ship.<sup>76</sup> The modified text of the Rules provides for the period of the carrier's responsibility to cover the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge, 'port-to-port'. The carrier is deemed to be 'in charge of' the goods from the time he takes over the goods from the shipper until he delivers the goods by handing them over to the consignee.<sup>77</sup>

It should be noted that the Hague-Visby Rules as modified by the *Carriage of Goods by Sea Regulations 1998* were perceived to be a compromise position of extending the period of carriers' responsibility from 'tackle-to-tackle' to the period during which the cargo remained in the carrier's care within the limits of the wharf that was the intended destination of the goods. This was adopted as something less than the full Hamburg Rules 'port-to-port' position. However, it is clear that the extension of the carrier's period of responsibility is essentially a Hamburg Rules reform.

The last modification to the *Carriage of Goods by Sea Act* extended carriers' liability to cover loss due to delay. Under the unamended Hague-Visby Rules regime, shippers can sue for loss resulting from delay due to unreasonable deviation. The amended Rules specifically provide that the

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<sup>76</sup> *Id.*, Art. 1 (e).

<sup>77</sup> *Carriage of Goods by Sea Act 1991* (Cth) as amended, Schedule 1A Schedule of Modifications, Art. 1.

1. In ~~this convention~~ *these Rules*, the following words are employed, with the meanings set out below:—

(e) "Carriage of goods by sea" covers the period *during which a carrier is in charge of the goods, according to paragraph 2 of this Article* ~~from the time when the goods are loaded on to the time they are discharged from the ship~~.

3. *For these Rules:*

(a) *a carrier begins to be in charge of goods at the time the goods are delivered to the carrier (or an agent or servant of the carrier) within the limits of a port or wharf; and*

(b) *the carrier ceases to be in charge of the goods at the time the goods are*

carrier is liable for loss resulting from delay in delivery (as well as from loss of or damage to the goods) if the occurrence which caused the delay took place while the goods were in the carrier's charge, unless the carrier proves that it took all measures that could reasonably be required to avoid that occurrence and its consequences. The carriers should bear the liability for loss due to delay same as to the Hamburg Rules limit of 2.5 times the freight payable on the goods delayed, except where the delay is an 'excusable delay'.<sup>78</sup>

It should be noted that these modifications are the result of the work of the Cargo Liability Working Group, formed in 1995, which submitted a package endorsed by Australian shipping industry to amend the *Carriage of Goods by Sea Act 1991*. The modifications are expected to improve Australian liability regime and provide greater benefit to shipping industry. For example, before the Amendment Act 1997 and the Regulations 1998, the *Carriage of Goods by Sea Act 1991* was compulsorily applicable only to export bills of lading, the marine cargo liability regime was more of benefit to the receivers of Australian exports than to Australian receivers of imports.

It would appear that before the modifications of Schedule 1, overseas receivers of Australian cargo may receive more advantages from Australian law which incorporate the Hague-Visby Rules and which are compulsorily applicable only to export bills of lading. However, this situation will be changed because the new *Schedule of modifications* will

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*delivered to, or placed at the disposal of, the consignee within the limits of the port or wharf that is the intended destination of the goods.*

<sup>78</sup> The term 'excusable delay' is to be defined by reference to a list adapted from Section 55 of the *Marine Insurance Act 1909*, as follows:-

1. delay due to a deviation authorised by the shipper;
2. delay caused by circumstances beyond the control of the master and his employer;
3. delay reasonably necessary to comply with an express or implied warranty;
4. delay reasonably necessary for the safety of the ship or cargo;
5. delay for the purposes of saving human life or aiding a ship in distress where human life may be in danger;
6. delay reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or
7. delay caused by barratrous conduct of the master or crew.

be compulsorily applicable to both import and export bills of lading.<sup>79</sup> This can be considered as one of the advantages of the amendment.

It should be mentioned, however, that the industry proposals for amending the Australian marine cargo liability regime recommended that there should be explicit provision for arbitration in the *Carriage of Goods by Sea Act* because the Hague-Visby Rules do not provide for arbitration. It was the Hamburg Rules' aspect, Article 22, which states that parties may provide by agreement evidenced in writing that any dispute in relation to carriage of goods under the Hamburg Rules be referred to arbitration. However, the amended Act does not have the arbitration provisions and it is considered that arbitration provisions would provide benefit to Australian shippers if they were added in the Act.

#### Is Australian Marine Cargo Liability Regime Compatible with those of its Major Trading Partners?

The object of the *Carriage of Goods by Sea Act 1991* (Cth) is to introduce a regime of marine cargo liability that is up-to-date, equitable and efficient, and compatible with arrangements existing in countries that are major trading partners of Australia.<sup>80</sup> Therefore, after a long and serious debate on the Hamburg Rules issue since they came into force in 1992 until the Act was amended in 1997-1998, there is a question whether the Australian marine cargo liability regime is compatible with existing regimes in its major trading partners.

As earlier mentioned, at present Australian marine cargo liability regime is under the Hague-Visby Rules with some modifications. The modified text of the Hague-Visby Rules is certainly more up-to-date than the original one, especially the provisions concerning documents in electronic form. The amendment to the *Carriage of Goods by Sea Act 1991* has put Australia into the same position of its partners because most of them, namely: Japan, Korea, New Zealand, Singapore, China and the United

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<sup>79</sup> Similar provision to the Hamburg Rules, Art. 2 (1).

<sup>80</sup> *Id.*, Section 3.

Kingdom, are under the Hague-Visby Rules regime, except the United States which still under the Hague Rules but under a process of amendment.

It can be concluded that, the decision of the Federal Government not to adopt the Hamburg Rules in Australia in 1997 was the right decision. The *Carriage of Goods by Sea Amendment Act 1997* (Cth) and the *Carriage of Goods by Sea Regulations 1998* provide a positive sign for the Australian marine cargo liability regime. This is because there are a number of improvements in the law which give advantages to the shipping industry and the amended regime also puts Australia in line with its major trading partners. In particular, the amendment provides for a wider range of sea carriage documents including documents in electronic form<sup>81</sup> and a broader carriers' liability which extend the period of liability and cover loss due to delay; this amendment will provide more benefit to Australian shippers.

At present, the Australian marine cargo liability regime seems to be compatible with those operating in its trading partners. However it has to be accepted that liability regimes normally differ from one country to another in order to facilitate that countries' benefit. This can be seen in recent development in countries such as China, Japan and Thailand which altered their carriage of goods by sea legislation. The most recent developments which are now under consideration has been taken in one of the largest shipping countries, the United States. Therefore, it is essential to be aware of and take into account amendments to marine cargo liability regimes advanced in Asian countries and the United States.

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<sup>81</sup> *Carriage of Goods by Sea Act 1991* (Cth) as amended, Schedule 1A Art. 1.

## Suggested Legislation for Asia and the Pacific Countries

It is one object of the *Carriage of Goods by Sea Act 1991* (Cth) to take into account developments within the United Nations in relation to marine cargo liability arrangements. Thus, it is important to consider the following issue on suggested legislation for Asia and the Pacific countries.

A major organisation which intends to create uniformity in the areas of carriage of goods by sea for countries in Asia and the Pacific region is the Economic and Social Commission for Asia and the Pacific (ESCAP). In 1991, ESCAP provided Guidelines for Maritime Legislation (Guidelines Volume I).<sup>82</sup> The Guidelines recommended that when the Hamburg Rules come into force countries party to this Convention will adopt these rules and other countries may want to follow suit. The Hague Rules and the Visby Protocols, however, are to continue to remain in force in several countries. As an interim measure pending accession to the Hamburg Rules, countries that have the Hague Rules or Hague-Visby Rules may want to add certain provisions based on the Hamburg Rules, to the extent they are not in conflict with the Hague Rules or the Hague-Visby Rules such as the following:

- (a) The scope of application of the law could be expanded to all contracts of carriage of goods by sea, whether or not covered by a bill of lading, when either the port of shipment or the port of destination are in the country concerned;
- (b) The law may apply to all kinds of cargo, whether carried on deck or under deck; as respects deck cargo the liability of the carrier should differ, according to whether stowage on deck is agreed by the shipper and mention thereof is made in the document of transport, or such stowage is made without an express agreement or contrary thereto;
- (c) The document evidencing the contract of carriage may be, according to the request of the shipper, a bill of lading, a sea waybill or other similar document. The signature on such document may be in handwriting, printed in facsimile, perforated or in symbols, or made by any other mechanical or electronic means;

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<sup>82</sup> See *Guidelines for Maritime Legislation (Guidelines Volume I)* (3rd ed., 1991), Economic and Social Commission for Asia and the Pacific (ESCAP) ST/ESCAP/1076.

(d) Other provisions of the Hamburg Rules, such as those on the liability of the actual carrier (Art. 10) and on through carrier (Art. 11), may also be included.<sup>83</sup>

...

Furthermore, it may be considered whether the law should apply also before loading and after discharge, within the limits set out in Art. 4 of the Hamburg Rules, so as to ensure the application of the same provisions for the whole period during which the goods are in the custody of the carrier. Attention is drawn to the fact that in such a manner the legal regime would become mandatory in respect of the periods between the time when goods are taken in charge by the carrier at the port of loading and the time of loading, and respectively between the time of discharge and the time when the goods are taken over by the consignee, whilst the Hague Rules do not apply proprio vigore during these periods and, therefore, the carrier can provide a liability regime less onerous than that of the Hague Rules.

These ESCAP's Guidelines, however, were considered by the United Nations Commission on International Trade Law (UNCITRAL) as unacceptable in that they advised states to merely revise their version of the Hague or the Hague-Visby Rules with some provisions of the Hamburg Rules rather than adopting the Hamburg Rules.<sup>84</sup>

UNCITRAL was informed that in 1993 the secretariat of ESCAP published a book entitled Guidelines for Maritime Legislation (Guidelines Volume I) which commented upon the Hamburg Rules and the United Nations Terminal Operators Convention. As to the Hamburg Rules, the Guidelines advised States already parties to the Hague Rules, so as to modernize the existing regime, to add to the regime based on the Hague Rules certain provisions based on the Hamburg Rules. It was observed by UNCITRAL that this advice was likely to lead to disparity and inconsistency and ran counter to the recommendations contained in General Assembly resolutions. UNCITRAL was of the view that:

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<sup>83</sup> *Id.*, at 166.

<sup>84</sup> Yearbook of the United Nations Commission on International Trade Law (Vol. XXIV, 1993) at para. 326-328, 34.

The Commission heard expressions of serious concern about the type of advice given in the Guidelines, the fact that the advice given fostered continued disharmony of law, and the fact that the secretariat of the Commission was not invited to participate in the preparation of the book. It was considered to be unacceptable that a United Nations publication should express views that questioned in an unbalanced and biased way the advisability of adherence to Conventions prepared by United Nations diplomatic conferences.

As a result, UNCITRAL called upon the Economic and Social Commission for Asia and the Pacific to undertake immediate revision of the Guidelines and to issue the revised publication within the shortest possible time.<sup>85</sup>

It should be noted that, even though the United Nations requested the Secretary-General of UNCITRAL to make increased efforts to promote wider adherence to the Hamburg Rules,<sup>86</sup> such efforts taken by UNCITRAL are unlikely to achieve this in practice. This is because since the entry into force of the Hamburg Rules, the liability regime of the Hamburg Rules co-existed with liability regimes based on the Hague and Hague-Visby Rules. The purpose of promoting unification of international marine cargo liability regime on the basis of the Hamburg Rules is not practical in commercial reality.

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85      *Ibid.*

86      General Assembly resolution 48/33 of 9 December 1993. Official Records of the United Nation Convention of the Carriage of Goods by Sea, Hamburg, 6-31 March 1978 (United Nations publication, Sales No. E.80.VIII.1), document A/CONF.89/13, annex I.

The General Assembly,

Reaffirming its conviction that the progressive harmonization and unification of international trade law, in reduction or removing legal obstacles to the flow of international trade, would significantly contribute to universal economic cooperation among all State on a basis of equality, equity and common interest, and to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples,

Recalling the enter into force, on 1 November 1992, of the United Nation Convention of the Carriage of Goods by Sea, 1978 (Hamburg Rules),

1. Invites all States to consider becoming parties to the United Nation Convention of the Carriage of Goods by Sea, 1978 (Hamburg Rules);
2. Requests the Secretary-General to continue to make increased efforts to promote wider adherence to the convention.

## Proposal to Amend the U.S. Carriage of Goods by Sea Act

As earlier examined, the proposal to amend the U.S. *Carriage of Goods by Sea Act 1936* is intended to bring the U.S. into line with the rest of the maritime nations.<sup>87</sup> The U.S. Maritime Law Association also has promoted the new legislation as a compromise international text which is acceptable to countries from both the Hague and Hamburg regimes.

The Carriage of Goods by Sea Bill contains the following useful improvements over the *Carriage of Goods by Sea Act 1936*:

1. It abolishes the error in management and navigation defense, 'nautical fault', as in the Hamburg Rules,
2. It adopts the package and kilo limitations of the Visby Rules,
3. It covers before loading and after discharge for the 'contracting carrier', as in the Hamburg Rules,
4. It covers deck cargo as in the Hamburg Rules,
5. It covers bills of lading, waybills and electronic documents as in the Hamburg Rules,
6. Its rules on prescription apply to suit, indemnity actions and arbitration as in the Hamburg Rules,

However, the proposed Carriage of Goods by Sea Bill which is now under consideration of the U.S. Senate, was negotiated extensively. As a result it is quite unlike the Hague or Hague-Visby or Hamburg Rules and is considered that it cannot be a guide for international law or the law of any other nation.<sup>88</sup> The proposed Carriage of Goods by Sea Act is in an unfamiliar language and format, causing confusion to American and foreign shippers, shipowners, carriers, merchants, judges and lawyers. Much of the old references and decisions will be redundant or at least be subject to a very difficult concordance, in those rare cases where that could be possible and useful.

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<sup>87</sup> *Supra* note 28.

<sup>88</sup> W. Tetley, Law Conventions Trampled: U.S. COGSA Sails Its Own Quirky Course (From Fairplay Magazine, October 15, 1998).  
[<http://www.admiraltylaw.com/tetley/usmlacog.htm>] (Apr. 1999).

Even though, the Bill contains some useful Hague-Visby Rules and Hamburg Rules provisions, but the other particular provisions adopted in the negotiations would seem to put the proposed Bill out of the mainstream of international law on carriage of goods by sea. In particular, the burden of proof rules in respect of fire and negligent navigation and management of the ship will prove difficult to discharge for cargo claimants. The provisions on jurisdiction and arbitration create a regime which applies to shipments to the U.S., or under foreign carriage contracts, with no choice but U.S. jurisdiction or U.S. arbitration permitted. Moreover, a whole new untested regime of carriage of goods seems to have been created in respect of the new allocation of responsibilities of the three types of carrier, and various new burdens of proof.<sup>89</sup>

It should be noted that countries which are trading partners of the U.S. will be affected by the new legislation. This is because the proposed legislation which applies not only contracts of carriage from the United States but also to the United States, will apply to all claims concerning shipments to the U.S., despite the fact that the contract of carriage is made in another country.

### Conclusions

The principal conclusion is that, at present Australia's marine cargo liability regime has reached a fair compromise on liability issues and is compatible with its major trading partners' regimes . The compromise on the Hamburg Rules principles is accepted by both sides of the shipping industry, and implemented by the *Carriage of Goods by Sea Amendment Act 1997* (Cth) and the *Carriage of Goods by Sea Regulations 1998*. The new legislation provide several improvements in liability issues, in particular, a wider range of sea carriage documents including documents in electronic form, and a broader carriers' liability which extend period of liability.

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<sup>89</sup> See more comments on the U.S. COGSA at Admiralty Law: [<http://www.admiraltylaw.com/tetley/cogsa.htm>] (Apr. 1999).

The secondary conclusion is that there remains a need for greater monitoring on a question whether Australia should, in the future, implement the Hamburg Rules in their entirety. Another significant point that needs a further consideration is that the amending in countries such as Australia and the United States of their Carriage of Goods by Sea Act may have great effects on international marine cargo liability regimes. The amending of liability regimes in these leading countries may create a wider gap in uniformity. Moreover, some countries such as the People's Republic of China and Thailand have already enacted their maritime law with a combination of the Hague Rules and the Hamburg Rules. This will result in more difficulty in creating uniformity for international marine cargo liability regime.

Although uniformity in marine cargo liability regimes is important in that it facilitates international trade, it is not the first priority to be considered by a trading nation. The first priority is a marine cargo liability regime that achieves an efficient balance of rights and liabilities between the carrier and shipper. If an international marine cargo liability regime is to be accepted, then the first priority must be to achieve this. The second priority is that uniformity of application of the rules should be provided. This enables the various interests concerned in the carriage of goods by sea to identify and cover their respective risk exposures with certainty and to be able to manage those risks effectively.

## CHAPTER VIII

### CONCLUSIONS

This thesis has considered and evaluated various problems with the bills of lading legislation and limit on the legal function of bills of lading in the international carriage of goods by sea. Two objectives were identified for this thesis: first the identification of major legal problems associated with bills of lading, and secondly the evaluation of whether the legislative reforms pertaining to bills of lading legislation have overcome those problems. The following conclusions can be drawn from the analysis of these aspects of bills of lading.

The first objective has been conducted by an analysis of bills of lading legislation which caused legal problems and it acknowledges that the fundamental problems occurred by the English *Bills of Lading Act 1855* (similar legislation in Australia, i.e. the *Bills of Lading Act 1857 (Tas)*). The English bills of lading legislation dominates the law in this area since England has been a large shipping nation for centuries. Most case decisions relating to bills of lading problems have been developed under this Act and in common law jurisdictions. Legal difficulties in the 1855 Act were originally created by the common law doctrine of 'privity of contract', in which only a person who is a party to a contract may sue for its breach. This common law principle is a major obstacle to the use of bills of lading because contracts of carriage in international trade are very complex and always involve multi-parties and link with other contracts.

The results of this analysis are the identification of two major legal problems in bills of lading legislation. First, the problem concerned with title of consignees to sue the carriers; a consignee of a bill of lading as a buyer of the goods carried under that bill is not a party to the contract of carriage and cannot sue the carrier on the ground of breach of contract. Secondly, the problem concerned with third parties liability; a third party, such as a agent or servant of carriers, cannot have a protection from

exemption clauses in a bill of lading unless problem of privity and considerations are overcome, and, therefore, create difficulties in the interpretation of such exemption clauses.

This thesis acknowledges these problems as a major obstacle to limit the legal function of bills of lading. Other areas that has been identified as problems concerning bills of lading are marine cargo liability regimes and developments of electronic bills of lading.

The second objective of this thesis is to evaluate the impact and effectiveness of bills of lading legislation. This evaluation focuses on the legislative reform of bills of lading. The reform took place as a result of a recognition of bills of lading problem by the English Law Commission.<sup>1</sup> Leading cases in bills of lading problem such as *The Aliakmon*<sup>2</sup>, and *The Delfini*,<sup>3</sup> demonstrate legal problems.<sup>4</sup> Legislative reform in the English jurisdiction by the *Carriage of Goods by Sea Act 1992*, and similar reform in Australia by the Sea-Carriage Documents Acts are a significant improvement because the legislation provides legal structures that could solve the privity of contract problem. The new legislation separate contractual rights from the passing of property of the goods in order to ensure the rights of consignees of the goods.

It is concluded that bills of lading legislative reform can eliminate the legal problems associated with bills of lading, provided that they are supported by clear judicial interpretations of the provisions.

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<sup>1</sup> *Right of Suit in Respect of Carriage of Goods by Sea*, Law Commissions of England and Scotland, (Law Com. No. 196, Scot Law Com. No. 130), (London, 1991) following the Law Commission Working Paper No. 112, *Rights of Goods in Bulk*, and Scottish Law Commission Discussion Paper No. 83, *Section 16 of the Sale of Goods Act 1979 and Section 1 of the Bills of Lading Act 1855*.

<sup>2</sup> [1986] 2 Lloyd's Rep 1.

<sup>3</sup> [1990] 1 Lloyd's Rep 252.

<sup>4</sup> See Chapter III.

It is noted that the analysis conducted on a comprehensive scope of bills of lading legislation, including domestic law and international legislation related to bills of lading, has demonstrated that the effectiveness of such an evaluation is limited. However, the criteria for the evaluation can be identified. First, the evaluation is based upon the research questions posed in the introduction of this thesis, and secondly, the evaluation takes two approaches; one regarding to Australia and the other international trade. The following conclusions can be offered with respect to those criteria.

### **Have major legal problems in bills of lading been eliminated?**

The primary conclusion is that the bills of lading legislative reforms<sup>5</sup> could solve the above identified problems with some limitations. Despite the reforms introduced in the English jurisdiction by the *Carriage of Goods by Sea Act 1992* (U.K.) and recently in Australia by the *Sea-Carriage Documents Acts* (1997-1998) these has not been fully tested in the courts, it is concluded, however, that the new legal structures will ensure the rights of consignees of the goods.

The new legal structures<sup>6</sup> eliminate legal difficulties by separating contractual rights from the passing of property to the goods. Therefore, with regard to the title to sue problem, a consignee who becomes the lawful holder of a bill of lading has rights and liabilities under a contract of carriage as if he had been an original party to the contract, regardless of the transfer of property in the goods carried under that contract. As a result, ocean transport and trading of cargoes, particularly bulk cargo such as oil, rice or iron ore, will have less legal problems. The buyers of such goods in transit are assured of their rights under contracts of carriage as evidenced by bills of lading.

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<sup>5</sup> See Chapter V.

<sup>6</sup> See the *Carriage of Goods by Sea Act 1991* (U.K.) section 2, and the *Sea-Carriage Documents Act 1997* (NSW) section 8.

With regard to third parties liability problem, it is concluded that the problem has not been entirely eliminated. While legislative reforms of bills of lading improve the position of consignees of bills of lading, position of third parties to a contract of carriage stay the same. They still have no contractual rights as parties to the contract but have to rely on exemption clauses in bills of lading, or the main contracts with the carrier, as seen in Chapter IV (circular indemnities and sub-bailment on terms). However, the third parties problem may have been solved from an indirect consequence of the legislative reforms. Since consignees of bills of lading have their rights ensured upon the contract of carriage and have no difficulty in suing the carriers, they have no need to take a tort action against a third party.

With regard to Australia, it is noted that the *Sea-Carriage Documents Acts* must be passed by the Australian States and Territories in order to achieve uniformity of reform in Australian bills of lading legislation. At present, Queensland, Tasmania and the Northern Territory have not yet enacted the new legislation.

**Have marine cargo liability regimes been improved  
to promote a better balance of rights and liabilities  
between parties to a contract of carriage?**

With regard to Australia, it is concluded that Australian marine cargo liability regime has been improved by legislative reform; the *Carriage of Goods by Sea Amendment Act 1997* (Cth) and the *Sea-Carriage Documents Acts* and it becomes more compatible with those regimes of its trading partners. There are significant advantages to be gained from such reform, in particular advantages to Australian shippers. The amendment of the liability regime, which covers all shipping documents and deck cargo, and has extended the period of the carrier's responsibility, will give more benefits to Australian exporters than the Hague-Visby Rules provisions. There will also be further benefits for Australia as a cargo owning nation

in general, because this will put the country in a better position in international trade amongst its major trading partners.

It is difficult to predict the impact of changes in limitations of liability to the shipping industry as a whole. However, extensive studies suggest that there will be no significant commercial impact and that the proposed amendment of the existing law is a fair compromise among all parties involved in the shipping industry.<sup>7</sup>

With regard to international marine cargo liability regimes, it is concluded that since the entry into force of the Hamburg Rules in 1992, marine cargo liability regimes have been improved to promote a balance of rights and liabilities in some stages.

The growing list of countries, including Australia, that have adopted mixed liability regimes between Hague-Visby and the Hamburg Rules<sup>8</sup> demonstrates the acceptance of some legal aspects of the Hamburg Rules. It is noted, however, that at present there is no uniformity between the various mixed regimes. The United States proposed amending the *Carriage of Goods by Sea Act*<sup>9</sup> will create a wider gap between liability regimes and affect other countries as examined in Chapter VII.

While uniformity of marine cargo liability regimes is one of the key issues that could reduce conflict of law in international trade, achieving such uniformity is a very difficult process. The United Nations and UNCITRAL have made the best effort to promote unification of marine cargo liability regime on the basis of the Hamburg Rules,<sup>10</sup> but the acceptance of the Convention by the international community is unlikely to be achieved.

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<sup>7</sup> Cth of Aust., Department of Transport and Regional Development, 'Improving Australia's Marine Cargo Liability Regime' Information Paper on measures to amend the *Carriage of Goods by Sea Act 1991* (July 1996), Report of the Marine Cargo Liability Working Group (September 1995).

<sup>8</sup> See M. Davies, 'Australian Maritime Law Decision 1995', [1996] 3 L.M.C.L.Q. 379, see also P. N. Prove, 'The Proposed Amendments to the Carriage of Goods by Sea Act 1991, and International Uniformity' in International Commercial Law [<http://uniserve.edu.au/law/pub/icl/transcom/intUniformity.html>] (Jan, 1997).

<sup>9</sup> See The United States Position in Chapter VII above.

<sup>10</sup> General Assembly resolution 48/33 of 9 December 1993. Official Records of the

## **Are bills of lading legislation sufficient enough to facilitate the use of electronic bills of lading?**

As seen in Chapter VI, there are a number of rules that support the use of electronic bills of lading, including the UNCITRAL Model Law on Electronic Commerce (1996). The Australian Sea-Carriage Documents Acts (1997-1998) take a similar approach to the U.K. *Carriage of Goods by Sea Act* 1992, and also has more comprehensive provisions for electronic and computerised sea-carriage documents. However, a conclusion that the law is sufficient enough to facilitate the use of electronic bills of lading is difficult to make given the fact that electronic bills of lading have not widely operated and the law has not been fully tested by the courts.

It is concluded, however, that the reforms of bills of lading legislation have improved some legal aspects concerning electronic bills of lading. In particular, the wider scope of legislation could eliminate problems concerning shipping documents other than traditional bills of lading. By using the term 'sea-carriage document', the Sea-Carriage Documents Acts apply to sea-waybills, ship's delivery orders and other shipping documents other than 'paper' bills of lading, including electronic bills of lading. The legal technique in drafting definitions, such as 'data message', and structuring a legislation concerning electronic data interchange by introducing the 'functional equivalence approach' could overcome the requirements of signatures and documents.

It should be noted that international confidence in the use of electronic bills of lading is essential apart from the adequacy of legislation. An electronic bill of lading is certainly still a bill of lading. It may facilitate international trade more effectively than a paper bill in certain circumstances, but in doing so it has to perform those functions of a bill of lading.

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