

# CARGO INTERESTS IN AUSTRALIA: STANDING ON THE EDGE — IMBALANCES THAT PERMEATE INTERNATIONAL SALE CONTRACTS, CARRIAGE CONTRACTS AND RECOVERY RIGHTS

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## Introduction

This paper analyses the documentary and legal framework that underpins carriage of goods by sea in Australia, with particular focus on the interaction between the contract of sale and the contract of carriage. It then considers how adequately this framework supports cargo interests to exercise recovery rights in Australia.

Two important factors create the milieu for the analysis outlined above: namely, Australia is a nation of shippers and Australian maritime law is distinguished by its inconsistency. History gives credence to the fact that Australian interests are predominately cargo owning. In the second reading speech on the *Carriage of Goods by Sea Bill 1991* (Cth), Senator Tate noted that ‘Australia remains essentially a shipper nation ...’.<sup>1</sup> As regards our maritime law, Sir Anthony Mason astutely concluded that a ‘[I]lack of uniformity is a significant aspect of Australian maritime law’. The correlation between these factors and the analysis reveal a great irony for Australian cargo interests.

Although it is universally recognised that inconsistency (or uncertainty) impedes international trade and shipping,<sup>2</sup> a quest for certainty in our law has arguably impeded the interests of cargo owners, from a commercial viewpoint.

Lord Mansfield observed three centuries ago in *Vallejo v Wheeler*:<sup>3</sup>

In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go on.

In this paper the quest for certainty and how it impacts upon cargo interests is considered from two perspectives. First, international trade law and domestic commercial law relating to contracts of sale are reviewed; and secondly, the development of our maritime law relevant to contracts of carriage is critically analysed.

## The Contract of Sale

From an Australian perspective, international trade begins with a contract of sale and ends with a contract of carriage, culminating in the transport and delivery of cargo to overseas destinations. It is characterised by the variability of commodity transactions, the practical consequences of which may include:

- Contracts of sale that have been scantily drafted, are missing necessary terms, or contain inappropriate terms;
- Contracts of carriage that have not been executed by all relevant parties;
- Contracts that are evidenced by any number of documents, including commercial invoices; transport documents; correspondence; email exchanges; or a combination of any of these (the effect of which may be unclear or inconsistent);
- Documents relied upon to interpret the intention of the parties when entering into contracts of sale that are task-oriented, not evidence-oriented;

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<sup>1</sup> The Hon Senator M C Tate, ‘Carriage of Goods by Sea Bill 1991’ (Second Reading Speech, Commonwealth Parliament of Australia, Canberra, 14 August 1991).

<sup>2</sup> Mason, A, ‘Harmonisation of Maritime Laws and the Impact of International Law on Australasian Maritime Law’ (1999) 14 *Maritime Law Association of Australia and New Zealand Journal* 1.

<sup>3</sup> (1774) 1 Cowp 143, 153.

- Uncertain outcomes when disputes arise.

An insight into the fluid contractual arrangements that typify the variable nature of international trade is given by Bergin J in *IBBCO Trading Pty Ltd v HHH Casualty & General Insurance Ltd*:<sup>4</sup>

IBBCO carries on the business of exporting beef, seafood and dairy products to its customers worldwide ... the usual course of dealings between IBBCO and [its customers] ... was the [customer] usually placed its orders ... by telephone ... . At the time [the customer] placed an order, a price was agreed upon as well as the terms and conditions of sale. [The customer] advised IBBCO of the port of destination as well as the approximate date it required the goods to be shipped ... IBBCO would send a confirmation of sale. [The customer] was not expected to reply. After IBBCO received the original bill of lading it raised a commercial invoice and issued a bill of exchange addressed to [the customer] in respect of the consignment.

This variable commercial environment is complicated by a legal framework that pervades in respect of international trade and carriage law. The contract of sale is the means of transferring physical possession and legal title to goods from one party to another. It will be interlinked with a contract of carriage (bill of lading and/or a charterparty) which shares some of those transference roles (particularly where third party interests are concerned). These contracts may depend upon each other,<sup>5</sup> but at times the terms may conflict. The interaction between them can be illustrated by the example of damages being recoverable for losses suffered on a charterparty, when a contract of sale is breached.<sup>6</sup>

In so far as cargo interests are concerned, the proficiency of the contract of sale and its effective interaction with the contract of carriage may be adversely affected by:

- The incorporation of inappropriate customary terms of trade.
- Australia's inconsistent approach to the interpretation of the United Nations Convention on Contracts for the International Sale of Goods ('Vienna Sales Convention').
- Conflicting judicial approaches to trade (or sale) contracts and carriage contracts.

Further, cargo interests principally focus on terms of payment and risk, rather than on the passing of title, when entering into a contract of sale. In general terms, the concept of risk relates to parties' obligations under a contract of sale (for example, the delivery of goods or the payment of freight and insurance) and the concept of title deals with proprietary rights to property, from which rights to sue may flow. This is an important distinction when ascertaining cargo interests' rights of recovery. In that context, title, not risk, may be paramount.

It is a commercial reality that many cargo owners are more concerned with closing the deal ('front end') than problems associated with legal disputes arising from a breach of contract ('back end'). However, the ultimate outcome for cargo owners will be contingent upon which terms are incorporated into the contract of sale.

## Customary Terms of Trade

Contracts of sale consistently include inappropriate terms of trade, resulting in the assumption of unnecessary risk by cargo owners. Whether this is due to lack of knowledge on the part of traders, or lack of innovation on the part of their legal advisors, is a matter of speculation.

More prudent cargo owners will carefully consider and negotiate (if possible) the terms of each contract that relates to the sale and transport of international cargo. For this reason, it is important to consider what terms are commonly included when forming an agreement for the international sale of goods.

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<sup>4</sup> [2001] NSWSC 490 (unreported), 2.

<sup>5</sup> *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd* [2006] FCA 1324: It was unsuccessfully alleged by the plaintiff seller, in an attempt to avoid damages for breach of the charterparty, that the charterparty was conditional upon the contract of sale being concluded.

<sup>6</sup> *Downs Investments Pty Ltd (in liq) v Perwaja Steel SDN BHD* [2002] 2 Qd R 462.

The most common terms incorporated into an international contract of sale are Incoterms.<sup>7</sup> These terms deal with the transfer of risk, not title. In the absence of express agreement to the contrary, the Vienna Sales Convention<sup>8</sup> applies (provided the parties to the international contract of sale conduct business in Convention States, or the governing law of the sales contract is the law of a Convention State). Once again, the Vienna Sales Convention deals with the concept of risk. The most probable reason for this is a pragmatic one; namely, risk has significance for rights of indemnity under policies of insurance.

It has been observed in practice that cargo interests incorporate traditional Incoterms, rather than more commercially appropriate terms. This results in cargo owners being exposed to risks against which they have limited capacity to guard. Importers are most acutely affected by this dilemma, as they often lack an insurable interest to protect cargo located in foreign ports until it is on board the ship.

Cargo owners in Australia frequently rely on Incoterms known as FOB, C&F and CIF. These terms are described below.

**FOB (free on board)**<sup>9</sup> means that the seller fulfils its obligation to deliver when the goods have passed over the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risk of loss of, or damage to, the goods from that point. The seller's obligations by virtue of FOB terms include:

- Providing goods in conformity with the contract of sale. This will usually include any necessary packaging that is required for the transport of the goods to the stipulated destination.
- Obtaining (at its own risk and expense) any export licence or other formalities necessary for the exportation of goods.
- Delivering goods on board the vessel named by the buyer at the named port of shipment on the date within the period stipulated.

**C&F (cost and freight)**<sup>10</sup> means that the seller must pay the costs and freight necessary to bring the goods to the named port of destination. The risk of loss or damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered on board the vessel, is transferred from the seller to the buyer when the goods pass the ship's rail in the port of shipment.

**CIF (cost insurance freight)**<sup>11</sup> means that the seller must pay the costs and freight necessary to bring the goods to the named port of destination, and must procure marine insurance against the buyer's risk of loss of, or damage to, the goods during the carriage. The seller contracts for the insurance and pays the premium.

Whether a contract of sale is negotiated FOB or C&F/CIF is an important consideration when the sale necessitates the charter of a ship, as in the case of *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd*.<sup>12</sup> Although the nomination of FOB or C&F terms will logically reflect who bears the chartering costs, it may be open for parties to negotiate liability for demurrage.<sup>13</sup> Therefore, careful consideration must be given to the parties' responsibilities when incorporating terms into a sale contract that is linked to a carriage contract.

The frequent inclusion of FOB, C&F or CIF terms in contracts of sale as opposed to more adaptable terms such as FCA (free carrier)<sup>14</sup> is not easily explained.<sup>15</sup> FOB, C&F and CIF all provide that the risk in goods will transfer to the buyer as soon as the goods pass the ship's rail. FCA was introduced to cater for the situation (that frequently arises with containerisation) where the reception point for goods is not at the ship's rail, but the point at which the goods are packed into a container on land prior to transport by sea or other means. By virtue of

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<sup>7</sup> Incoterms provide international rules for the interpretation of the most commonly used trade terms in foreign trade. The current version, Incoterms 2000, was agreed to by the International Chamber of Commerce in Paris in 1999.

<sup>8</sup> The Vienna Sales Convention was developed by 62 participating countries in 1980 at a diplomatic trade conference held in Vienna. The participants unanimously agreed to a Convention that provided uniform law for international sales of goods. The Vienna Sales Convention entered into force on 1 January 1988, a year after it received ratification from 11 countries. It was ratified by Australia on 1 April 1989.

<sup>9</sup> International Chamber of Commerce, *Incoterms 2000* (1999).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> [2006] FCA 1324.

<sup>13</sup> *Ibid.*

<sup>14</sup> There are actually two FCA terms: FCA Seller's Premises, where the seller is not responsible for inland freight; and FCA Named Place (International Carrier), where the seller is responsible for inland freight.

<sup>15</sup> Australian Law Reform Commission, *Review of the Marine Insurance Act 1909*, Report No 91 (2001), 248 ('ALRC MIA Review').

FCA terms, risk passes at the time the goods are made available to the carrier and the buyer is responsible for the forwarders' fees, the loading of the ship, all charges on arrival and delivery to the destination.

Cargo interests continue to use FOB terms in situations where the goods are delivered to the carrier before loading on board the ship. The International Chamber of Commerce has commented on this practice:<sup>16</sup>

Regrettably, merchants continue to use FOB when it is totally out of place thereby causing the seller to insure risks subsequent to the handing over of the goods to the carrier named by the buyer. FOB is only appropriate to use where the goods are intended to be delivered 'across the ship's rail', or in any event, to the ship and not where the goods are handed over to the carrier for subsequent entry into the ship, for example stowed in containers or loaded on lorries or wagons in so-called roll on roll off traffic.

The use of FCA terms would result in an importing buyer assuming the risk of goods from the time the seller delivers goods to the carrier, which is usually at an inland delivery point. The importing buyer would then be responsible for insuring goods from the time the seller delivers goods to the carrier and would have an insurable interest to do so.

When an importing buyer trades on FOB terms, it does not gain the requisite insurable interest in goods until they pass the ship's rail at the port of loading (as this is the point when risk passes to the buyer). In the event that goods are lost or damaged before loading, the importing buyer will find itself at the mercy of the risk management employed by the seller, which may be non-existent.<sup>17</sup> The importing buyer's recovery rights will be limited to making a claim in a foreign jurisdiction against the seller, or seeking indemnity from an insurance policy that may not respond or even be in existence.

The requirement of an insurable interest under the *Marine Insurance Act 1909* (Cth) ('MIA')<sup>18</sup> remains a problem for Australian importers who negotiate contracts of sale on FOB terms.<sup>19</sup> This dilemma was one of the reasons for the ALRC MIA Review that the insurable interest requirement be removed from the MIA.<sup>20</sup>

Perhaps the reason for the continued use of the terms FOB, C&F and CIF (rather than a term such as FCA) is as simple as finding comfort with the familiar as opposed to the uncertainty of the unknown. Similarly, the Vienna Sales Convention is unknown to Australian cargo interests. This is unfortunate, as the Convention is particularly advantageous for exporters in transactions involving transshipment or multimodal carriage. The Vienna Sales Convention favours transferring risk to the buyer from the moment cargo is 'handed over' to the first carrier (not dissimilar to the FCA Incoterm discussed above). The role that the Vienna Sales Convention plays in Australia's legal framework is now explained.

## Vienna Sales Convention — the Australian Approach

Curiously, the Vienna Sales Convention is rarely relied upon by traders and their legal advisors. At the time of writing this paper, a paucity of decisions dealing with the Vienna Sales Convention could be found in Australia's precedential history.<sup>21</sup> Perhaps the reluctance to rely on this Convention is embedded in the approach taken by our legal system when implementing international conventions such as the Vienna Sales Convention, and the inconsistent decisions that result. Australia has traditionally subscribed to the 'dualist' or 'transformation' approach<sup>22</sup> when giving effect to international conventions. This means that a ratified international treaty does not form part of our national law, unless enacted by domestic legislation. Therefore international law is not a part of, but one of the sources of our law.<sup>23</sup> The result is that the process of assimilation with our domestic law takes place with varying degrees of success. Even though the Vienna Sales

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<sup>16</sup> International Chamber of Commerce, *Incoterms 2000*, Paris, 1999, 24.

<sup>17</sup> *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1991) 25 NSWLR 699.

<sup>18</sup> MIA, ss 10 and 11.

<sup>19</sup> ALRC MIA Review, above n 15, 248; see also Taylor, M, 'Is the Requirement of an Insurable Interest in the Marine Insurance Act Still Valid?' (2000) 11 *Insurance Law Journal* 147, 159-60; Galbraith, D, 'An Unmeritorious Defence — The Requirement of an Insurable Interest in the Law of Marine and Related Matters' (1993) 5 *Insurance Law Journal* 177; Mason, A, 'The Future of Marine Insurance Law' (Paper presented at Ebsworth & Ebsworth Maritime Law Lecture, Sydney, 1995).

<sup>20</sup> ALRC MIA Review, above n 15, 255-258.

<sup>21</sup> See: *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623; *Roder Zelt-Und Hallenkonstruktionen GmbH v Rosedown Park Ltd* (1995) ACSR 153; *Perry Engineering Pty Ltd (rec and mgr appointed) (administrators appointed) v Bernold Ag* [2001] SASC 15 (unreported); *Downs Investments Pty Ltd (in liq) v Perwaja Steel SDN BHD* [2002] 2 Qd R 462.

<sup>22</sup> Mason, above n 2, 4-6; compare *Starke J in Chow Hung Ching v The King* (1948) 77 CLR 449, 470-471.

<sup>23</sup> *Ibid*: see 462 (Latham J); 478 (Dixon J).

Convention has been given the force of law in every Australian state by domestic legislation,<sup>24</sup> its application could best be described as confused.

A challenging example of this assimilation process is provided by the judgment of Williams JA in *Downs Investments Pty Ltd (in liq) v Perwaja Steel SDN BHD*,<sup>25</sup> in which he equated the common law concept of repudiation with the concept of fundamental breach of contract as contemplated by the Vienna Sales Convention. His Honour stated: 'When one has regard to Article 64(1) and Article 72 it is clear that the Convention adopts, at least to some extent, the common law concept of repudiation.'<sup>26</sup> Throughout the judgment the Court sought to find parallels between the Vienna Sales Convention and common law contractual principles, rather than dealing with the Vienna Sales Convention as an independent remedial source.

Contrasting approaches to the application of the Vienna Sales Convention can be seen in *Downs Investments*<sup>27</sup> and *Perry Engineering Pty Ltd (receiver and manager appointed) (administrators appointed) v Bernold Ag*.<sup>28</sup> In the former case, the plaintiff respondent's failure to rely upon the Vienna Sales Convention until the sixth day of trial was dealt with in this way by the Queensland appellate court:

[A] plaintiff would not ordinarily be prevented from recovery where all essential facts were established merely because there was an omission to refer to a statutory provision or some error was made in referring to a statutory provision...

In the latter case, however, Burley J in the Supreme Court of South Australia took the opposing view, that it is necessary to plead the statute specifically in order to rely upon the Vienna Sales Convention.

Whilst Australian courts might awkwardly attempt to equate the Vienna Sales Convention with common law contractual principles, and at times require specific pleading before it can be relied upon, there are benefits for cargo interests if the Vienna Sales Convention is understood and applied (during formation of the contract and any litigated dispute).

It is trite to say that, pursuant to the Vienna Sales Convention, the exact moment of the passing of risk is most significant. The party who bears the risk bears the loss under a contract of sale.<sup>29</sup> For example, if goods are lost before delivery, the buyer may still be required to pay the seller (ie the buyer bears the risk of the shipment). In this instance, if the risk has already passed to the buyer (after the loss has occurred), the seller may be discharged from having to supply equivalent goods.<sup>30</sup>

The basic rule of the transfer of risk is that the agreement of the parties is vital. Risk will pass at the time agreed upon, or intended by, the parties.<sup>31</sup> In the context of the passing of risk, the primacy of the agreement or the intention of the parties is recognized by all Common Law jurisdictions. It is reflected in the sale of goods legislation enacted in Commonwealth jurisdictions<sup>32</sup> and it is also echoed in the Uniform Commercial Code ('UCC') of the United States.

The whole tenor of the Vienna Sales Convention is that the parties' intention will override any rule to the contrary.<sup>33</sup> Accordingly, if the terms of the contract conflict with the Convention, the agreed contract terms will prevail.

The Vienna Sales Convention favours transferring the risk of goods transported by sea to the buyer at these times:

- If the goods are sold by combined transport or are transhipped, from the moment the seller 'hands over' the goods to the first carrier;<sup>34</sup> and

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<sup>24</sup> See for example: *Sale of Goods (Vienna Convention) Act 1986* (Qld); *Sale of Goods (Vienna Convention) Act 1986* (NSW); *Sale of Goods (Vienna Convention) Act 1987* (Vic).

<sup>25</sup> [2002] 2 Qd R 462.

<sup>26</sup> Ibid 481.

<sup>27</sup> Above n 25.

<sup>28</sup> [2001] SASC 15 (unreported).

<sup>29</sup> Tetley, W, *Marine Cargo Claims* (3<sup>rd</sup> Ed, 1998), 163.

<sup>30</sup> But if the seller's act or omission has resulted in the loss, the risk in the goods will not transfer to the buyer.

<sup>31</sup> Tetley, above n 29, 152-153.

<sup>32</sup> See for example: *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1923* (NSW); *Sale of Goods Act 1953* (Vic).

<sup>33</sup> Honnold, J O, *Uniform Law for International Sales under the 1980 United Nations Convention* (2<sup>nd</sup> Ed, 1991), 125.

<sup>34</sup> Article 67 of the Vienna Sales Convention.

- If the goods are sold in transit, when the contract of sale is concluded.<sup>35</sup>

## Article 66

Article 66 of the Vienna Sales Convention conveys the well-understood principle that issues regarding the conformity of the goods with the contract of sale is determined at the time when risk passes to the buyer. Loss of, or damage to, the goods after the risk has passed to the buyer does not discharge the buyer from its obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Academic writers have interpreted this Article as having only a limited application, on the basis that it only affects transactions where the seller directly hands over the goods to the buyer.<sup>36</sup> If that were the case, it is difficult to imagine many occasions when this would occur in international trade. A more considered interpretation is that Article 66 reflects the contract law principle that the non-delivery of goods (or delivery of non-conforming goods) will not invalidate a contract of sale.<sup>37</sup>

It has been argued that the wilful destruction of goods by a third party prior to their purported delivery will frustrate the contract of sale, thereby alleviating the buyer's obligation to pay. In considering this issue, the New South Wales Court of Appeal in *NSW Leather Co Pty Ltd v Vanguard Insurance Co*<sup>38</sup> held that the better view is that such conduct will not frustrate a contract of sale (unless the destruction was as a result of the conduct of the seller).<sup>39</sup> The Court relied upon the well-established contractual principle that a sale without delivery is valid.<sup>40</sup>

The effect of Article 66 is that payment (if not already made) must be made to the seller for goods shipped, once the risk has passed to the buyer, irrespective of any damage suffered during transit, unless that damage was due to the negligence of the seller.

Although Article 66 appears harsh, it is based on the premise that the buyer is usually in a better position than the seller to assess the damage at the end of the voyage and make an insurance claim. As it is possible for the buyer to overcome the consequences of loss by seeking indemnity from an insurer, this Article is less onerous than it first appears.<sup>41</sup>

The corollary of Article 66 is that, if the buyer can establish that the loss or damage was caused as a result of an act or omission of the seller, the buyer will then be relieved of its obligation to pay for the goods. By way of illustration, if the seller fails to properly package the goods or delays the shipment and as a result the goods are lost or damaged, the buyer is not obliged to pay for the goods, despite the fact that risk has passed.<sup>42</sup>

However, in the event that loss is suffered as a result of theft or vandalism, the buyer will not be able to escape payment for the goods. In those circumstances, the buyer's only remedy will be to make an insurance claim.

## Article 67

Article 67 contemplates transactions that include combined transport terms or goods being transhipped. Article 67 provides that the risk in goods passes when the goods are 'handed over' to the first carrier.<sup>43</sup>

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<sup>35</sup> Article 68 of the Vienna Sales Convention.

<sup>36</sup> Berman, H J, and Ladd, M, 'Risk of Loss or Damage in Documentary Transactions under the Convention on the International Sale of Goods' (1988) 21 *Cornell International Law Journal* 423.

<sup>37</sup> *Webber v Davis* (1857) 44 Maine 147; 69 Am Dec 87, 88.

<sup>38</sup> (1991) 25 NSWLR 699, 712.

<sup>39</sup> Article 70 of the Vienna Sales Convention.

<sup>40</sup> *NSW Leather Co Pty Ltd v Vanguard Insurance Co* (1991) 25 NSWLR 699, 712.

<sup>41</sup> Above n 33, 452.

<sup>42</sup> If it is established that the seller's conduct has resulted in a fundamental breach of contract then the contract will be frustrated and consequently, the risk in the goods will not pass to the buyer (per Article 70 of the Vienna Sales Convention).

<sup>43</sup> Article 67 states:

- (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, this risk does not pass to the buyer until the goods are handed over to the carrier at that place.

This Article must be read in conjunction with Article 69. Situations that do not fall within Article 67 will automatically be governed by Article 69. Put simply, Article 69 concerns situations where the buyer collects the goods from the seller or the seller delivers the goods to the buyer.<sup>44</sup>

Article 67 has the capacity to be interpreted very broadly. For example, if a carrier owns and operates containers as well as ships, the risk in goods could transfer at the time the goods are stowed into the containers prior to being loaded aboard the ship. Alternatively, if the seller operates facilities for dockside loading, the seller will not 'hand over' the goods to the carrier until they enter the ship's hold.

It has been suggested that the term 'handed over' was deliberately inserted into the Vienna Sales Convention, in lieu of the more traditional concept of 'passing the ship's rail', in a response to the modern practice of containerised transport and bulk shipments of commodities.<sup>45</sup>

In this context, it is especially important for the contract of sale to specify when the risk passes in transactions involving the shipment of containerized or bulk cargo. If the contract of carriage is silent, Article 67 may apply. In this event, a dispute may ensue over the meaning of the term 'handed over to the first carrier'. Although the use of such an ambiguous term may cause confusion for parties attempting to pinpoint when the risk in goods passed, it may assist buyers to adequately insure purchased goods against pre-shipment losses.<sup>46</sup>

In the event that there has been a deviation in the shipment of goods in breach of the terms of the contract of carriage, it will be a matter of degree to ascertain whether the risk will pass or whether there has been a fundamental breach of contract pursuant to Article 70. In general terms, the principles regarding the transfer of risk are not overturned by minor deviations.<sup>47</sup>

It is also important to note that the retention of documents will not interfere with the transfer of risk, once the goods have been 'handed over' to the carrier. The contract may be on 'cash against documents' terms. This involves payment in exchange for documents, which often cannot occur until the goods are in transit. In the event that the goods are damaged during the voyage, it would be impossible to establish whether the damage occurred before or after the exchange of documents.

Therefore, if the contract is on 'cash against documents' terms and the goods are handed over to the carrier prior to the cash/document exchange, Article 67 will operate to split the time when the risk and the title passes in the goods. In these circumstances, risk in the goods will pass earlier in time than title in the goods passes.<sup>48</sup>

In summary, the advantage of Article 67 is that it contemplates current practices in the stowage of cargo and the loading of ships (for example, containerisation and the loading of bulk commodities). In this way, the traditional concept of risk 'passing over the ship's rail' is modernised. However, the disadvantage of Article 67 is that it is open to a broad interpretation. As a result, disputes may arise between parties as to its meaning, particularly with respect to the term 'handed over to the first carrier'.

## Article 68

Article 68 applies to goods sold in transit. It provides that risk will pass on the conclusion of the contract of sale.<sup>49</sup>

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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 to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

<sup>44</sup> Honnold, above n 33, 456.

<sup>45</sup> Ibid, 459.

<sup>46</sup> See MIA, ss 10 and 11. An insurable interest is required (for example, risk in goods) before marine cargo insurance can legally operate.

<sup>47</sup> Honnold, above n 33, 463.

<sup>48</sup> Ibid, 464.

<sup>49</sup> Article 68 states:

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

Of particular interest when considering the application of this Article, is the potential for the retroactive passing of risk in certain circumstances. By way of explanation, Article 68 allows for the risk to pass before the conclusion of the contract if the 'circumstances so indicate'; namely, when documents embodying the contract of carriage are handed to the carrier. An example of this is when a sale invoice together with a policy of insurance (for the benefit of the buyer) is handed to the carrier, thereby transferring to the buyer the total risk of the voyage. In those circumstances, notwithstanding the fact that the buyer has not yet paid for the goods, the risk will pass prior to the conclusion of the contract of sale. This is similar to the situation contemplated by FOB and CIF Incoterms.

The final element of Article 68 is whether the seller knew, or ought to have known, at the conclusion of the contract, that the goods were lost or damaged. If the seller had actual or constructive knowledge of the fact that the goods were lost or damaged and did not disclose this to the buyer, the risk of the goods will not pass to the buyer, but will stay with the seller. In addition by virtue of Article 70, the seller will be liable for any resultant damage suffered due to the goods being in a damaged state.<sup>50</sup>

An important component of this element of Article 68 is that actual knowledge of the seller is not required. An objective test is applied if a seller 'ought to have known' of the fact that the goods were lost or damaged. Therefore, if a reasonable person standing in the position of the seller would have known of such loss or damage, then the risk will not pass to the buyer. Accordingly, a seller is not able to turn a blind eye to the fact that the goods were shipped in a damaged state or in a state likely to cause damage during transit, if he ought to have known of those circumstances and did not communicate them to the buyer.

Clearly, the intention of Article 68 is to ensure that sellers are not released from dishonest, reckless or even careless conduct. Article 68 attempts to ensure that sellers are held responsible for their conduct, rather than requiring that the insurance industry 'foot the bill'. However, this assumes that the buyer is able to recover against the seller. There are likely to be potential problems, in the event that the seller is impecunious or unable to be located for the purposes of seeking recovery. In addition, the cost and complexity of issuing proceedings against a seller in a foreign jurisdiction may be prohibitive to the buyer who is already 'out of pocket'. Therefore, where goods are damaged in transit (assuming the risk has passed to the buyer) the buyer will need to look to the carrier or to an insurer for recovery, unless the buyer can establish that:

- The seller knew or ought to have known that damage had occurred or would occur; or
- The seller committed a fundamental breach of the contract by supplying deficient goods.

The divergent rights of recovery that lie against a carrier pursuant to a contract of carriage and against a party to a contract of sale are considered in detail below. However, before reviewing relevant legal mechanics, it is useful to observe that there are conflicting judicial approaches to these types of contract.

## Conflicting Judicial Approaches to Trade Law and Carriage Law

It has been observed by one academic writer that courts take a conflicting approach when dealing with disputes arising from trade (or sale) contracts as opposed to carriage contracts.<sup>51</sup> This is a concern for cargo interests when trading internationally.

Unlike sea carriage law, there is a general rule of observance of good faith in sale contracts that are subject to the Vienna Sales Convention.<sup>52</sup> In such contracts there is also a general obligation to avoid damages.<sup>53</sup> International trade law values the primacy of the sale contract,<sup>54</sup> which translates into preservation of the

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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.

<sup>50</sup> Article 70 of the Vienna Sales Convention provides that, if it is established that the seller's conduct has resulted in a fundamental breach of contract, the contract will be avoided and consequently, the risk in the goods will not pass to the buyer.

<sup>51</sup> Derrington, S C, 'Commodity, Transport and Shipping Contracts' (Paper presented at the Australian Resources and Energy Law Association (AMPLA Limited) Annual Conference, Gold Coast, Queensland, 10 - 13 October 1997) 1.

<sup>52</sup> Article 7(1) of the Vienna Sales Convention.

<sup>53</sup> Article 77 of the Vienna Sales Convention.

<sup>54</sup> Honnold, above n 33, 125.

transaction.<sup>55</sup> In Australia, courts have imposed an obligation of good faith and reasonableness in the performance of contractual obligations, at least in respect of pre-contractual negotiations.<sup>56</sup> There is also evidence that Australian courts are prepared to apply principles of equity in commercial disputes.<sup>57</sup>

Conversely, the maritime law that surrounds carriage contracts has traditionally repelled any notion of ‘good faith’ and the application of equity on the basis that predictability and certainty is paramount.<sup>58</sup> Nevertheless, there is evidence that this strict approach has recently been eroded in favour of more ‘commercial’ outcomes, in decisions such as *The Happy Day*<sup>59</sup> and *The Starsin*.<sup>60</sup> Where the line will be drawn in respect of sea carriage cases is a matter of speculation.

In Australia, there is no clear approach. Whilst not directly on point, Hunter J in the Supreme Court of New South Wales decision of *Pacific Carriers Ltd v Banque Nationale de Paris*<sup>61</sup> affirmed that maritime law is in a special category and that ‘it is of the utmost importance in commercial transactions that parties affected by specified events should know their respective rights immediately’.<sup>62</sup> This seems straightforward enough, but Hunter J ultimately concluded that, whilst the interests of those engaged in international maritime trade lie in certainty, this does not exclude liability for pure economic loss where the circumstances of the case call for some ‘remedial relief’ against negligent conduct.<sup>63</sup> It appears that certainty is notionally upheld as the guiding principle, but may be cast aside when a more commercial outcome is considered appropriate.<sup>64</sup>

When the two categories of contract arise from the same set of facts (and essentially the same transaction) the conflicting approaches of the court may have a counteractive or detrimental effect. The remedies available to cargo interests are an important consideration when negotiating terms. If, for example, the Vienna Sales Convention is intended to apply to the sale contract and the principle of good faith is presumed, cargo interests might be surprised by a court’s unwillingness to apply such a principle when interpreting the carriage contract.<sup>65</sup> This makes it difficult for cargo interests to predict outcomes when disputes arise.

It has been suggested that the reasoning behind the inflexible approach of courts when considering carriage disputes is that third party interests are required to be protected (as carriage contracts are transferable or negotiable). By contrast, in sales contracts, third party rights do not require consideration.<sup>66</sup>

It is beyond the scope of this paper to fully explore these issues, other than to note that cargo interests should take into account the fact that carriage contracts will, in the main, be interpreted quite differently to international sales contracts. One example is the inflexible approach taken by courts when interpreting exclusion clauses that strike at the heart of contracts of carriage by sea. This will be discussed further below.

## Recovery Rights

When disputes arise regarding the sale of goods involving carriage by sea, it is important to understand the recovery rights of the seller and buyer as between themselves, and as against the carrier. The recovery rights that flow from the contract of sale will be considered here, and the remedies that arise directly in respect of the contract of carriage will be considered under the next heading.

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<sup>55</sup> Finn, P, ‘Good Faith and Fair Dealing: Australia’ (Paper presented at the Commercial Good Faith Conference, Auckland, New Zealand, 2 September 2005).

<sup>56</sup> *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 369; *Burger King Corporation v Hungry Jacks Pty Ltd* [2001] NSWCA 187, [159], [169].

<sup>57</sup> *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15 (equitable compensation).

<sup>58</sup> *Aries Tanker Corporation v Total Transport (The Aries)* [1977] 1 WLR 185; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scapetrate)* [1983] 2 AC 694; *Bank of Boston Connecticut v European Grain & Shipping Ltd (The Dominique)* [1989] 1 AC 1056.

<sup>59</sup> [2002] 2 Lloyd’s Rep 487.

<sup>60</sup> *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] 2 WLR 711.

<sup>61</sup> [2001] NSWSC 963.

<sup>62</sup> *Ibid*, [368].

<sup>63</sup> *Above n 61*, [372].

<sup>64</sup> Compare the High Court decision which upheld the judgment of Hunter J, but based solely on the application of contractual rather than principles of tort law: (2004) 218 CLR 451.

<sup>65</sup> See, for example, *The Scapetrate*, where the court refused to relieve the charterer from forfeiture when it tendered overdue hire the day following the notice of withdrawal of the charterparty. Lord Diplock accepted the view of Goff LJ in the Court of Appeal that the ‘possibility that shipowners may snatch at the opportunity to withdraw ships from the service of time charterers for non-payment of hire must be very well known in the world of shipping ...’: [1983] 1 QB 529.

<sup>66</sup> *Above n 51*, 9.

In particular, it is necessary to consider why the concepts of 'title to goods' and 'risk of goods' are important. The term 'title' is abstract. Title to goods is sometimes referred to as the "right to legal ownership" or the 'possessory title in property'.<sup>67</sup> Further, the passing of 'title' has different meanings and consequences in different jurisdictions. In Common Law systems, the basic rule regarding the passing of title is that it passes at the moment intended in the contract of sale.

Contrary to Common Law, the Civil Law codes do not specify that the parties' intention is of utmost importance. However, this distinction may have little practical effect, as the Civil Law does provide that title passes at the moment explicitly agreed upon by the parties or, if the contract is silent, at the moment when the parties exchange their consents to the sale. Accordingly, a consensus (or meeting of minds) between the parties is recognized in both Common Law and Civil Law jurisdictions.<sup>68</sup>

A significant difference between the concepts of title and risk is that historically in Common Law jurisdictions (such as Australia) it has been title in property (not risk) that has been decisive when recovering damages against a carrier for cargo loss. The House of Lords in *The Aliakmon*<sup>69</sup> held that title rather than risk is the significant criterion for determining who may sue the carrier in tort.

Parties to sea carriage documents may sue carriers in contract by virtue of the transfer of rights and liabilities provisions contained within the uniform Sea-Carriage Documents Acts enacted throughout the Commonwealth. Where contractual rights are transferred by operation of this legislation (for example, to the lawful holder of a bill of lading) there is a simultaneous extinguishment of the original party's contractual rights.

However, it is important to note that the person to whom the contractual rights are transferred is only entitled to exercise those rights for the benefit of the person *who sustained the loss or damage*.<sup>70</sup> Therefore, it is still critical to establish which party suffered the loss, and the answer to that question is dependent upon title to goods.

Quite separately, a claim against a buyer of goods can exist in contract on the basis that risk, not title, has passed. A seller may have suffered a contractual loss as a result of a breach of the contract of sale (for example, economic loss such as loss of profit or opportunity), notwithstanding the fact that title in goods has not passed. For completeness, if both risk and title have passed to the buyer, this will not excuse the seller if goods are not in accordance with the terms of the contract of sale.<sup>71</sup>

The interaction between the contract of carriage and the contract of sale is crucial where recoverable rights are concerned. If damage to cargo is caused at sea, it may be difficult to determine whether title passed to the buyer before or after the damage occurred. It becomes necessary to determine who suffered the loss.

An interesting scenario arises where goods are damaged at sea as a result of the carrier's conduct after title has passed to the buyer (ie the purchase price is paid before the damage occurs). In these circumstances the seller is in breach of the contract of sale for failing to deliver conforming goods and the carrier is in breach of the contract of carriage.

A cause of action may arise directly against the carrier by the buyer, but the buyer may be precluded from recovering consequential losses (for example, economic loss) as a result of unforgiving limits of liability imposed by the terms of contract of carriage.

In addition, cover offered under marine cargo policies (cargo clauses) is usually limited to the invoiced price of goods plus 10 per cent. If consequential losses exceed that amount, the buyer may be left with significant uninsured losses.

The buyer may prefer to claim against the seller pursuant to the terms of the contract of sale in the event that an insurance indemnity is denied, or consequential losses are significant, or for any other commercial reason. To

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<sup>67</sup> *The Sanix Ace* [1987] 1 Lloyd's Rep 465.

<sup>68</sup> Tetley, above n 29, 152-153.

<sup>69</sup> *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] 2 Lloyd's Rep 1; see also *The Sanix Ace* [1987] 1 Lloyd's Rep 465, 468-69.

<sup>70</sup> See s 5 of the *Sea-Carriage Documents Act 1996* (Qld), also replicated in the other States and Territories of the Commonwealth of Australia. This section embodies the common law principle that it is not possible to recover damages if no loss has been suffered. See *The Sanix Ace* [1987] 1 Lloyd's Rep 465; *EMI (NZ) Ltd v Wm Holyman & Sons Pty Ltd* [1976] 2 NZLR 566.

<sup>71</sup> *Kwei Tek Chao v British Traders & Shippers Limited* (1954) 2 QB 459; Sutton, *Sales and Consumer Law* (4<sup>th</sup> Ed, 1984), 745-746.

preserve the trading relationship, the seller may be keen to resolve the dispute. The seller may repay the purchase price or supply a replacement shipment or otherwise meet all aspects of the claim made. The seller would then be entitled to seek indemnity from the carrier for the contractual loss suffered.

A cause of action against the carrier for indemnity by the seller arises this way:

The seller (B) becomes liable to pay an amount to the buyer (A). B claims that its liability to A arose through a breach of contract or negligence on the part of the carrier (C). B therefore claims damages from C equal to the amount of B's liability to A.

This action is properly characterised as one for indemnity within the meaning of Article 3 rule 6bis under the Amended Hague Rules ('Australian Rules').<sup>72</sup> This issue has not been conclusively determined, but what authority there is, points in favour of the view that the action of B against C would be an action for indemnity.

In *China Ocean Shipping Co v The Owners of The Andros*<sup>73</sup> (while this point does not seem to have been argued) the Privy Council proceeded on the basis that where A is under an actual or potential liability to B, and A claims an indemnity by way of damages against C, that will be 'an action for indemnity' within the meaning of Article 3 rule 6bis.<sup>74</sup>

The advantage of an indemnity claim under the Australian Rules is that the period for issuing proceedings is extended from one year to six years. The one year time limit applies to the action B against C, but a more generous time limit applies to the alternative action A against C. The rationale behind that rule applies whether A's action against C is one under a contract of express or implied indemnification, or whether it is a claim for damages against C, the damages claimed being the amount for which A is liable to B.

This interpretation is commercially realistic. As Pincus J said in *Westpac v P & O Containers*:<sup>75</sup> 'Depending on context, a lawyer might well describe as one for indemnity a claim for damages in which the measure of damages is the amount which the plaintiff is liable to pay to another person.'

More recently, the New South Wales Court of Appeal<sup>76</sup> rejected an argument that a claim for damages could never be characterized as a claim for indemnity. Their Honours emphasized that the word 'indemnity' can take colour and meaning from the context in which it is used.

It is evident that cargo owners' rights of recovery are contingent upon a number of variables, including:

- Which terms have been incorporated into the contract of sale;
- When title was intended to pass, taking into account all the circumstances of the transaction;
- When damage occurred, and the most probable cause of the damage;
- Whether adequate insurance cover is in place;
- The commercial benefits of recovering against a party to the contract of sale as opposed to a carrier.

This paper does not propose to address the liability of a carrier in detail as this topic is worthy of an entire dissertation. However, when cargo owners seek compensation from a carrier pursuant to a contract of carriage, such as a bill of lading, the results are often unrewarding. The following part of this paper will explain some reasons for this.

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<sup>72</sup> *Carriage of Goods by Sea Act 1991* (Cth), Schedule 1A.

<sup>73</sup> [1987] 2 Lloyd's Rep 210.

<sup>74</sup> Ibid, 213.

<sup>75</sup> (1991) 102 ALR 239, 242.

<sup>76</sup> *Narui Gold Coast Pty Ltd v Charles Harrison Pty Ltd* [2003] NSWCA 238.

## The Interaction between Carriage Contracts and the Imbalances that Exist for Cargo Interests

The contract of carriage is usually evidenced by a bill of lading issued by the carrier or the carrier's agent to the shipper. The bill of lading plays a central role in the international trading environment. It meets several commercial objectives, including:

- Allowing the exporting seller to require payment before, or at the point of delivery to the carrier;
- Enabling the bearer of risk at sea to obtain adequate insurance cover;
- Providing assurance to the importing buyer that the goods for which it pays will ultimately be received;
- Facilitating a commercial regime so the importing buyer can on-sell as soon as possible, to one or more customers, and whilst goods are in transit.

Distinguishing characteristics of the bill of lading are its varied role and changing nature.<sup>77</sup> The bill of lading performs a number of functions. These are universally understood to be:

- A receipt;
- Evidence of the contract of carriage;
- If 'negotiable', it gives a right to possession of the goods and can be regarded as a document of title.

The nature of a bill of lading may change in relation to the same transaction depending upon who is the holder of a bill of lading. For example, in relation to a voyage charterparty, the bill of lading merely acts as a receipt as between the shipowner and the charterer. However, if the bill of lading is endorsed to a third party, it will fulfill all three functions as between the shipowner and the third party holder.

Bills of lading, charterparties and contracts of sale interrelate and overlap in various contexts. Voyage charterparty terms may be incorporated into a bill of lading; and a charterparty may be conditional upon the formation of a contract of sale. In other words, a charterparty may be conditional upon a charterer delivering cargo during an agreed loading period, so that a failure to find a market relieves both parties of their obligations.<sup>78</sup> Such an agreement is one 'subject to stem', and is not uncommon.<sup>79</sup>

The contractual framework is difficult enough, but can cargo interests 'claw back' any ground in the negotiation or application of key terms such as the period of responsibility for goods and carrier's liability within contracts of carriage?

The issue of whether cargo interests can negotiate more favourable terms is dependent upon knowledge, experience and most significantly, market share. Freedom of contract operates at its optimum when the parties have equal bargaining power and time for discussion. It is trite to say that these elements rarely exist when contracts are being negotiated for multimodal carriage of goods.

Devlin J expressed in *Firestone Tyre Co v Vokins*<sup>80</sup> the noble sentiment that it 'is illusory to say "we promise to do a thing, but are not liable if we do not do it"'. Unfortunately for cargo interests, that sentiment is a modern reality of the carriage transaction.

Almost 20 years have passed since the High Court decision of *Nissho Iwai Australia Ltd v Malaysian International Shipping Corp Berhad*<sup>81</sup> was handed down and there has been little (if any) softening of the principle that an exemption clause may successfully defeat the main object of the contract. Academic writers

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<sup>77</sup> See eg *Sea-Carriage Documents Act 1996* (Qld): ss 6, 8 and 10.

<sup>78</sup> Cooke, J, *Voyage Charters* (2<sup>nd</sup> Ed, 2001), [1.23].

<sup>79</sup> *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd* [2006] FCA 1324.

<sup>80</sup> [1951] 1 Lloyd's Rep 32, 39.

<sup>81</sup> (1989) 167 CLR 219.

have referred to this phenomenon as ‘the demise of the doctrine of fundamental breach’.<sup>82</sup> Australian courts are more than willing to strike at the core of the agreement and find that what was promised on the one hand, can be excluded with the other.

In the *Nissho* case, a container of frozen prawns was stolen shortly after it had been discharged and stacked at Glebe Island terminal, Sydney. The carrier’s agent, a stevedoring firm, was found to have a defective stacking system, but the carrier argued it was not liable to the owner of the goods (the endorsee on the bill of lading) on the basis of two exclusion clauses. The first clause absolved the carrier from loss or damage to goods after they were made available for delivery (which was interpreted to mean after discharge from the ship). The second clause relieved the carrier from liability for non-delivery.

Counsel for the owner of the goods submitted that the main object of the contract of carriage was the delivery of goods to the owner at Sydney and that to construe the exclusion clauses as exempting the carrier for non-delivery was to defeat the object of the contract. The High Court’s reasoning for rejecting that submission appears circular. The majority judgment held at p 227:

If the happening of a stipulated event will always result in the defeat of the main object of the contract, there will be no scope for holding that that object requires that conclusion that the exemption clause is not applicable to that event. But even in cases where the occurrence of the events stipulated in the exemption clause will not always defeat the main object of the contract, the nature of those events may nevertheless give rise to the inference that the clause was intended to apply to those events even when they occur in circumstances which defeat the main object of the contract.

The High Court also noted that the conduct of the stevedores, as agents or subcontractors of the carrier, was not that of the carrier itself and the protection afforded by the exclusion clauses would only be lost if a lack of reasonable diligence was attributable to the company. A company can only act through persons entrusted with the exercise of the powers of the company.<sup>83</sup>

A glimmer of optimism remains that carriers may not be able to avoid liability for non-delivery through lack of reasonable diligence directly attributable to them. However, in practical terms, this will be of limited value to cargo owners, as the high risk components of carriage, namely loading, discharge and storage are customarily performed by agents or subcontractors of the carrier. Further, the protections afforded to the carrier are usually passed on to the agents and subcontractors of the carrier, exempting them from liability.

The only conduct outside the sanctum of exclusion clauses likely to be directly attributable to the carrier would be acts of the master of the ship (for example, conversion or deliberate misdelivery to receivers without producing bills of lading at the port of discharge). This scenario arose in one of the claims in the appellate court decision of *Kamil Export (Aust) Pty Ltd v NPL (Australia) Pty Ltd*.<sup>84</sup> The cargo owner was successful in defeating the exemption clause and was entitled to recover against the carrier on the basis that the court ‘read down’ the relevant exclusion clause in the circumstances of the loss.

Marks J stated that the exclusion clause containing the words ‘howsoever caused’ should not apply so as to defeat the main object of the contract of carriage. His Honour said:<sup>85</sup>

The ... question then is whether the words of exemption [howsoever caused] should be interpreted to mean what they seem in clear language to say or whether they should be read down, in accordance with the relevant authorities, not to apply to loss due to conduct which would defeat the main object of the contract of carriage, namely delivery to the consignee on his proof of payment, as evidenced by production of the bill of lading.

This does not sit well with the *Nissho* decision, but the upshot for cargo owners is they will be able to pierce the shield afforded by carriage exclusion clauses *only* in exceptional circumstances.<sup>86</sup>

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<sup>82</sup> Davies, M, ‘Deviation is Alive and Well and Living in New South Wales’ [1991] *Australian Business Law Review* 379. See also Baughen, S, ‘Does Deviation Still Matter?’ [1991] *Lloyd’s Maritime and Commercial Law Quarterly* 70, 94-96; and Debattista, C, ‘Fundamental Breach and Deviation in the Carriage of Goods by Sea’ [1989] *Journal of Business Law* 22, 36.

<sup>83</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, 200 (Lord Diplock).

<sup>84</sup> [1996] 1 VR 538.

<sup>85</sup> *Ibid*, 544.

<sup>86</sup> Cf *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd (The Antwerpen)* (1993) 40 NSWLR 206, where the carrier was able to escape liability for its agent’s deliberate acts (namely the connivance of employees of the terminal operator) on the basis of an exclusion clause that provided it was relieved of all liability, whether or not the loss or damage was caused by actions constituting a fundamental

Understandably carriers are, for the most part, able to contract with confidence and incorporate exclusion clauses that remove their liability for failing to deliver the goods that are the very subject of the contract of carriage.

Carriers may also seek to transfer their primary responsibilities to cargo interests, notwithstanding a saving article contained within the Australian Rules. Article 3 rule 8 provides that:

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 connexion 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. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

More specifically, there is abundant English authority for the proposition that carriers can ‘contract out’ of Article 3 rule 2 of the Hague-Visby Rules<sup>87</sup> (containing the primary responsibility for a carrier to load, discharge and stow cargo) without offending Article 3 rule 8. This view has been consistently applied by the English judiciary for many decades.<sup>88</sup> The recent House of Lords decision of *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc*<sup>89</sup> is central to the analysis of the validity of this trading practice.

Whether this line of authority applies in Australia is a concern for cargo interests.

In *Jindal Iron*, Islamic Solidarity Shipping Co Inc (Islamic) owned a ship and voyage chartered it to TCI Trans Commodities AG for a voyage from Mumbai, India to Motril, Spain. Jindal Iron & Steel Co Limited (Jindal) sold steel coils to Hiasana SA (the consignee). The coils were shipped pursuant to a bill of lading and all terms and conditions of the charterparty were incorporated into the bill of lading. Where the Hague-Visby Rules applied compulsorily, they were incorporated into the bill of lading. It was common ground that they did. Clauses 3 and 17 of the charterparty provided respectively:

Freight should be paid ‘Free In and Out Stowed and Trimmed’ and ‘Lashed/Secured/Dunnaged’. Shippers/Charterers/Receivers were to put the cargo on board, trim and discharge cargo free of expense to the vessel.

The customary trading term (Incoterm) ‘Free In and Out Stowed and Trimmed’ (FIOT) means that the delivery of the cargo is effected as soon as the hatches are opened. However, discharge from the ship is usually performed by the receiver (consignee) as a post-delivery obligation.<sup>90</sup>

When the cargo was discharged at Motril it was found to be damaged by alleged rough handling during loading and/or discharging and/or inadequate stowage due to failure to provide dunnage, failure to secure the coils and/or stacking them so that the bottom layers were excessively compressed. Title to sue vested in either Jindal as shipper or the consignee and, as a result, both parties were named as plaintiffs.

Shipowners relied upon clauses 3 and 17 of the charterparty and denied liability for the claim on the basis that charterers agreed to load, discharge and stow the cargo at their own risk.

The questions for determination by the House of Lords were:

- Does Article 3 rule 2 define an ‘irreducible scope’ of service contract to be provided by the carrier or does it merely stipulate the manner of performance of functions the carrier has undertaken to perform?

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breach of contract. See also Davies, M, ‘Australian Maritime Law Decisions 1993’ [1994] *Lloyd’s Maritime and Commercial Law Quarterly* 407, 408.

<sup>87</sup> Identical to Article 3 rule 2 of the Australian Rules.

<sup>88</sup> *GH Renton & Co Limited v Palmyra Trading Corporation of Panama* [1957] AC 149; *Pyrene Co Limited v Scindia Navigation Co Limited* [1954] 2 QB 402; and more recently *A/S Iverans Rederei v KG MS Holstencruiser Seeschiffahrtsgesellschaft mbH & Co (The Holstencruiser)* [1992] 2 Lloyd’s Rep 378; *Trading Ltd v Afalona Shipping Balli Co Ltd (The Coral)* [1993] 1 Lloyd’s Rep 1.

<sup>89</sup> [2005] 1 WLR 1363.

<sup>90</sup> *The Filikos* [1983] 1 Lloyd’s Rep 9, 11-12.

- Is the carrier liable in any event to cargo owners when those functions are performed improperly on the basis that any transfer of responsibility is invalidated by Article 3 rule 8?

The House of Lords acknowledged long-standing English precedent to the effect that a reallocation of risk by agreement is permissible and that, in those circumstances, the carrier will not be liable: *Pyrene Co Ltd v Scindia Navigation Co Ltd*;<sup>91</sup> *GH Renton & Co Ltd v Palmyra Trading Corporation of Panama*.<sup>92</sup>

Jindal invited the House of Lords to depart from precedent. Disappointingly for cargo interests, the House did not. In the leading judgment Lord Steyn held that Devlin J's view expressed in *Pyrene* was carefully considered and correct. Devlin J had said at pp 417-418:

The phrase 'shall properly and carefully load' may mean that the carrier shall load and that he shall do it properly and carefully; or that he shall do whatever loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter may be more consistent with the object of the Rules. Their object ... is to define not the scope of the contract service but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the Rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the Rules should not leave the parties free to determine by their own contract the part which each has to play.

It was held that Article 3 rule 2 does not define the scope of the service contract but the terms upon which the agreed service is to be performed.

The House distinguished Article 3 rule 2 from Article 3 rule 1 (the obligation to make the ship seaworthy) by stating that the latter is a fundamental obligation which the owner cannot transfer to another, as the Rules impose an inescapable personal obligation.<sup>93</sup> Lord Steyn said at p 1371, para 19: 'On the other hand, Article 3 rule 2 provides for functions some of which (although very important) are of a less fundamental order e.g. loading, stowage and discharge of the cargo.'

This reasoning is difficult to rationalise, as there is likely to be a greater risk that cargo will be damaged as a result of inadequate loading/stowing/discharging processes than as a result of the ship being unseaworthy.

In justification for its decision, the House of Lords cited the 'great object of certainty' as being more important than a review of the rule of law. It is telling that Lord Steyn quoted from a judgment of Lord Mansfield delivered in 1774 to support the Court's adversity to reform on the basis that it is 'because speculators in trade then know what ground to go on'.<sup>94</sup> Is it the case that those same speculators expect a ship powered by sail and wind to carry cargo? On this reasoning it is difficult to fathom how debate, review and reform of the law might be achieved.

The House stated that, only where a decision has been demonstrated to work unsatisfactorily in the market or produces manifestly unjust results, would the House be persuaded to depart from precedent. Lord Steyn at p 1374, para 27 was convinced that cargo interests were not dissatisfied with the *Pyrene* line of authority for the following reasons:

- British cargo interests had not raised with the British Parliament their dissatisfaction with the state of English common law;
- It had not been a matter of discussion in trade journals; and
- Academic writers have not criticized the decisions.

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<sup>91</sup> [1954] 2 QB 402.

<sup>92</sup> [1957] AC 149.

<sup>93</sup> *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807.

<sup>94</sup> [2005] 1 WLR 1363, 1370; *Vallejo v Wheeler* (1774) 1 Cowp 143.

This presupposes that cargo owners have common interests, have a high level of trade organisation and are politically savvy. The competitive and disparate nature of the international trade environment does not easily lend itself to industry lobbying in the interests of achieving common outcomes.

One would have thought that the ‘manifestly unjust’ threshold would have been met on the basis that:

- Cargo interests customarily have a weak bargaining position;
- Where consignees (as third party bill of lading holders) are concerned, they have a complete absence of bargaining influence as in practice they often have not seen the charterparty;
- It is a practical reality that the carrier is bound to play some role in loading and discharging operations.

Although not motivated to reform the law, the House did recognise that the interests of third party bill of lading holders is an important consideration in the framework of international trade. Lord Steyn referred to a published report of UNCTAD,<sup>95</sup> *Charterparties: A Comparative Analysis*.<sup>96</sup> That report noted at paragraphs 341-343:

[C]harterparty terms relating to the loading, stowing and discharge of cargo may have a profound effect upon third party holders of charterparty bills of lading ... . If the incorporating words in the bill of lading are sufficiently widely framed the third party bill of lading holder may find for example that he is unable to claim against the shipowner under the bill of lading for damage to cargo caused in the course of loading or stowing the cargo ...

This will be so even if the bill is subject to the Hague or Hague-Visby Rules: and even if the third party bill of lading holder has neither seen the charterparty referred to, nor has any advance notice of the relevant charterparty clauses ...

Other charterparty clauses which may affect a third party bill of lading holder particularly are law clauses, lay time and demurrage clauses and lien clauses ...

The UNCTAD report concluded that, in considering any harmonisation or improvement of charterparty terms and the necessity for international legislative action, due regard should be taken of the interests of third party bill of lading holders as well as those of charterers and shipowners.<sup>97</sup>

Despite its decision, the House was open to the notion that the issues decided by it may be worthy of review by an international forum. Lord Steyn made reference to the Draft Convention on Transport Law currently being considered by UNCITRAL. Relevantly, Lord Steyn commented at p 1376:

[UNCITRAL] is currently undertaking a revision of the rules governing the carriage of goods by sea. This exercise involves a large scale examination of the operation of the Hague-Visby Rules. It apparently extends to Article 3 rule 2. It will take into account representations from all interested groups, including shipowners, charterers, cargo owners and insurers. By itself this factor makes it singularly inappropriate to re-examine the *Renton* decision now.

The state of the English law is not the position adopted in the US, South Africa or France. In the US the duties of loading, stowing and discharging are non-delegable duties of the carrier.<sup>98</sup> South African courts have followed US jurisprudence. Similarly, in France a shipowner may not contract out of responsibility for improper stowage by an FIOST clause.<sup>99</sup>

Courts in New Zealand,<sup>100</sup> Pakistan<sup>101</sup> and India<sup>102</sup> follow the English line of authority, but the position in Australia is less certain.

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<sup>95</sup> United Nations Conference on Trade and Development. Established in 1964, UNCTAD promotes the development-friendly integration of developing countries into the world economy.

<sup>96</sup> *UNCTAD Report on Charterparties: A Comparative Analysis* (1990).

<sup>97</sup> *Ibid*, 354.

<sup>98</sup> *Nichimen Co Inc v MV Farland* (1972) 462 F 2d 319; *Demsey & Associates Inc v Steamship Sea Star* (1972) 461 F 2d 1009; *Associated Metals & Minerals Corp v MV Arktis Sky* (1992) 978 F 2d 47; *Tubacex Inc v MV Risan* (1995) 45 F 3d 951.

<sup>99</sup> Tetley, W, *Marine Cargo Claims*, (4<sup>th</sup> Ed, in draft), 21.

<sup>100</sup> *International Ore & Fertilizer Corp v East Coast Fertiliser Co Ltd* [1987] 1 NZLR 9.

<sup>101</sup> *East and West Steamship Co v Hossain Bros* [1968] 2 Lloyd's Rep 145.

<sup>102</sup> *The New India Assurance Co Ltd v M/S Splosna Plovba* (1986) AIR Ker 176.

It could be observed that Australia's trading interests are aligned with the US, to the extent that Australia is an exporting nation that has traditionally sought to safeguard cargo interests. Conversely, England historically regards itself as a nation of shipowners and has those interests at heart.

Nevertheless, Australian courts have, for the most part, followed the authorities of *Pyrene* and *Renton*,<sup>103</sup> but the dissenting judgment of Handley JA in the relatively recent appellate decision of *Nikolay Malakov Shipping Co Ltd v SEAS Sapfor Ltd*<sup>104</sup> has left the door ajar for an intrepid court to reconsider Australia's position. The majority judgment of Sheller JA and Cole JA took the path most travelled.

In *Nikolay Malakov* the carrier discharged timber cargo at Port Kembla due to a diversion of the ship that was permitted under the bill of lading. The cargo was held in open bond storage and was water damaged by rain prior to being transported inland by the road haulage carrier (Tex Transport). The carrier agreed to stow the cargo and arrange for its agent, Tex Transport, to transport the cargo to its agreed destination, Sydney.

Clauses in the bill of lading provided that the carrier's responsibility for cargo ceased once cargo left the ship's deck at the discharging port (relieving the carrier from some of its discharge obligations) and excluded the carrier from liability thereafter. Article 3 rule 2 of the Hague Rules was incorporated into the bill of lading, which provided that the carrier was responsible for the carriage of goods from 'tackle-to-tackle'. The bill of lading potentially restricted the carrier's responsibility more narrowly than 'tackle-to-tackle'.

Amongst other things, the Court of Appeal had to consider whether the carrier's purported 'shedding' of its discharge obligations and exclusion from liability were valid.

At first instance, the trial judge considered that the obligation of the carrier to 'properly and carefully' discharge the cargo could include either:

- The act of the ship's agent in *contracting for* the discharge of the cargo into open bond storage; or
- The act of the ship's agent in *causing the discharge* of the cargo to open bond storage.

This extraordinary concept was adopted by Handley JA in his dissenting judgment. His Honour held that the duty imposed on a carrier by Article 3 rule 2 would not be satisfied by a damage-free transfer of the cargo from ship to wharf or from ship to subcontractor. His Honour observed that '[o]n the owner's argument its duty in discharging would be satisfied by discharging the cargo onto a wharf being consumed gradually by fire or a wharf that was known to lack the stability to support the cargo...'.<sup>105</sup>

Handley JA proffered the controversial view that a carrier who negligently engages incompetent stevedores will be in breach of its personal obligation to put in place a 'sound system' for the discharge of cargo and render itself liable for post-discharge loss or damage causally related to its negligence.<sup>106</sup> To support this view, his Honour referred to an English decision of Lord Shaw, where a carrier was found to have breached its duty to properly discharge cargo by stacking it onto an obviously unsafe wharf.<sup>107</sup> His Honour also considered that making arrangements via agents or subcontractors for post-discharge refrigeration and storage of reefer cargo was an example of how Article 3 rule 2 must practically be extended beyond the ship's tackle.

Arguably this conclusion broadens the construction of Article 3 rule 2 beyond what was originally intended. It is not disputed that the obligation to discharge cargo 'properly' extends the obligation to something more than merely taking care.<sup>108</sup> Lord Reid in *Albacora SRL v Westcott & Laurance Line Ltd*<sup>109</sup> confirmed that 'properly' means in accordance with a 'sound system' and that 'may mean rather more than carrying the goods carefully'.<sup>110</sup> This was followed in *Caltex Refining Co Pty Ltd v BHP Transport Ltd*.<sup>111</sup> However, whether that obligation is a personal one, remains unresolved.

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<sup>103</sup> *Shipping Corp of India v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142; *Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd* (1993) 117 ALR 507.

<sup>104</sup> (1998) 44 NSWLR 371.

<sup>105</sup> *The Saudi Prince (No 2)* [1986] 1 Lloyd's Rep 347, 356.

<sup>106</sup> *Thomas Wilson Sons & Co Ltd v Cargo Ex Steamship Galileo* [1915] AC 199, 205 (per Shaw LJ).

<sup>107</sup> *International Packers London Ltd v Ocean Steamship Co* [1955] 2 Lloyd's Rep 218.

<sup>108</sup> [1966] 2 Lloyd's Rep 53; see also *GH Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1957] AC 149, 166.

<sup>109</sup> [1966] 2 Lloyd's Rep 53, 58.

<sup>110</sup> (1993) 34 NSWLR 29.

The House of Lords in *Jindal Iron* held that the carrier's obligation to provide a seaworthy ship (Article 3 rule 1) was personal, but that the obligations to load, discharge and stow cargo were not.

The dissenting judgment of Handley JA is surprising in three ways:

- The carrier's obligation to discharge cargo (pursuant to Article 3 rule 2) was deemed personal;
- The carrier's obligation to 'properly and carefully' discharge cargo (pursuant to Article 3 rule 2) was held to include the making of proper arrangements for the reception and care of cargo on shore (such as appropriate storage and careful subcontracting);<sup>111</sup> and
- It held that Article 3 rule 8 would render null and void *any* clause in the bill of lading which relieves the carrier from liability for breach of Article 3 rule 2 or lessen its liability for such a breach.

It is fair to say that cargo interests have not been best served by the English line of authority that has flowed from *Pyrene*. Handley JA's dissenting judgment does more than tip the scales in favour of cargo interests. It shifts the weight so far to the benefit of shippers that its legal rationale is questionable, and as a result it is unlikely to be followed in future cases.

Striking a balance between a carrier's right to contract on terms and ensuring that same carrier undertakes responsibility for what it promises to do, is a difficult task. However, some guidance may be found in Article 7 of the Australian Rules. That Article provides:

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connexion with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from the ship on which the goods are carried by sea.

Exclusion clauses that apply to the conduct of the carrier before loading and after discharge of cargo have been upheld.<sup>112</sup> This seems reasonable and in the spirit of the scheme created by the Australian Rules. In *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd*,<sup>113</sup> Sheppard J made an obiter comment that exemption clauses within a bill of lading would be valid 'so long as they were read as applying only to acts and omissions which occurred before loading and after discharge; see Article VII'.<sup>114</sup>

This has practical implications for shipper-packed containers, often referred to as an FCL (ie full container load) shipment. It is common for bills of lading to include a term dealing with the transfer of responsibility for container stuffing and container fitness to the shipper in FCL shipments. Part of one such 'FCL clause' is:<sup>115</sup>

If a container has not been packed by or on behalf of the Carrier:

- (1) the Carrier shall not be liable for loss of or damage to the goods caused by matters beyond his control, including, inter alia, without prejudice to the generality of this exclusion:
  - (a) the manner in which the container has been packed; or
  - (b) the unsuitability of the goods for carriage in the Container supplied, or
  - (c) the unsuitability or defective condition of the container or the incorrect setting of any temperature controls thereof, provided that if the container has been supplied by or on behalf of the Carrier, this unsuitability, defective condition or incorrect setting could have been apparent upon inspection by the Merchant at or prior to the time when the container was packed...

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<sup>111</sup> The carrier's obligation to make proper arrangements for the reception and care of the goods on shore will also attach to a carrier who is to discharge freezer cargo. Loss or damage to such cargo on shore is inevitable unless proper arrangements are made before discharge. See generally: *The Arawa* [1977] 2 Lloyd's Rep 416, 426; *Mayhew Foods Ltd v Overseas Containers Ltd* [1984] 1 Lloyd's Rep 317, 319.

<sup>112</sup> See *Nikolay Malakov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371, albeit in the context of the Hague Rules and not the Australian Rules; *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd (The Antwerpen)* (1993) 40 NSWLR 206, where such an exclusion clause was upheld when read together with a clause relieving the carrier of liability for conduct amounting to a fundamental breach of contract.

<sup>113</sup> (1993) 113 ALR 667.

<sup>114</sup> *Ibid*, 683. However, in that case the Hague Rules applied. As the evidence established that the cause of the damage occurred prior to loading, the negligent acts were outside the 'tackle-to-tackle' period of carriage of goods by sea. Therefore, the forwarder/carrier's liability was governed by the terms of the consignment note and not the Hague Rules.

<sup>115</sup> *P&O Nedlloyd Limited Terms and Conditions of Carriage*, version 2/DRS B/L3 10/97 (S).

FCL clauses have the potential to enable carriers to avoid liability for all claims arising from temperature damaged goods, even the failure of ship-sourced power supply. It is arguable that a 'sound system' for carrying, keeping and caring goods as provided by Article 3 rule 2 of the Australian Rules would include the provision of an uninterrupted power supply.<sup>116</sup> However, based on Australian jurisprudence in recent decades, that outcome is far from certain.

Unremarkably, Australian courts most often follow the well-worn path of English precedent (which overwhelmingly favours shipowners, such as in *Jindal Iron*)<sup>117</sup> than the less certain, intrepid route in the interests of shippers. It is questionable whether the minimum protection contemplated by Article 3 rule 8 of the Australian Rules retains any significance for Australian cargo interests against a background where carriers are regularly able to avoid liability absolutely in all circumstances. Indeed, McHugh J held the view that the Australian Rules do not contain any implied obligation for the carrier to deliver the goods in the state in which it received them.<sup>118</sup>

It is not useful to suggest that only one approach should, or could, be adopted. However, if the carrier's conduct involves extraordinary acts or omissions that result in damage (particularly, whilst the cargo remains on board the ship) such as: carrying underdeck cargo on deck;<sup>119</sup> electing to operate the controls of machinery cargo during the process of unloading;<sup>120</sup> failing to supply dunnage;<sup>121</sup> or failing to contract with onshore stevedores to store cargo undercover safe from rain damage;<sup>122</sup> it is argued that it is not unreasonable to expect that some liability might flow by virtue of the saving Article 3 rule 8.

A balanced approach is highly desirable here, but is rarely adopted. The scheme of the Australian Rules imposes responsibilities and liabilities on carriers (Article 3) from which they cannot contract out (Article 3 rule 8) and carriers are entitled to certain immunities, except in special cases (Article 4). Finally, carriers may shift their responsibilities and liabilities for damage to goods before loading and after discharge (Article 7). This scheme does not go so far as to enable carriers to 'opt out' of all responsibility and liability. Exclusion clauses are contemplated and carriers are entitled to transfer liability for damage to goods outside the 'tackle-to-tackle' period. It is submitted that it is reasonable for such exclusion clauses to be read down (even when drafted in accordance with Article 7) if loss results from deliberate conduct that is directly attributable to the carrier (for example, carrier connivance in theft of goods,<sup>123</sup> or a master misdelivering goods without the production of a bill of lading).<sup>124</sup>

Cargo claims against carriers are rarely made successfully. The pursuit of certainty that enables carriers the freedom to exclude liability absolutely is achieved at the expense of Australian shippers, whose interests Parliament intended to preserve under the Australian Rules. Absent a judicial trend towards cargo owning interests, shippers and their legal advisors should, where possible, scrutinise exclusion clauses within contracts of carriage in order to protect cargo interests at the 'front end' through careful negotiation.

## Conclusion

Cargo interests in Australia can achieve higher value commercial trading results by:

- negotiating appropriate customary terms of trade in sale contracts;
- appreciating that terms of trade form only part of the contract terms;
- understanding the interaction between the sale contract and the carriage contract;

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<sup>116</sup> Wong, J, 'Container Transportation and Anomalies in the Law' (1995) 23 *Australian Business Law Review* 340, 341-343.

<sup>117</sup> [2005] 1 WLR 1363.

<sup>118</sup> *Great China Metal Industries Company Ltd v Malaysian International Shipping Corp Berhad (The Bunga Seroja)* (1998) 196 CLR 161.

<sup>119</sup> *Wibau Maschinenfabrik Hartman SA v Mackinnon Mackenzie & Co (The Chanda)* [1989] 2 Lloyd's Rep 494; see also *F Kanematsu & Co Ltd v The Ship 'Shahzada'* (1957) 96 CLR 477.

<sup>120</sup> *Tasman Express Line Ltd v JI Case (Australia) Pty Ltd* (1992) 111 FLR 108; cf the decision of the trial judge Carruthers J in *JI Case (Australia) Pty Ltd v Tasman Express Line Ltd (The 'Canterbury Express')* (1990) 102 FLR 59, where he held that the carrier could not rely on the exclusion clause on the basis that it deviated from the agreed scope or course of the contract of carriage.

<sup>121</sup> *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc* [2005] 1 WLR 1363.

<sup>122</sup> *Nikolay Malkov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371.

<sup>123</sup> *Nissho Iwai Australia Ltd v Malaysian International Shipping Corp Berhad* (1989) 167 CLR 219.

<sup>124</sup> *Kamil Export (Aust) Pty Ltd v NPL (Aust) Pty Ltd* [1996] 1 VR 538.

- maximising recovery rights by incorporating clear terms into the sale contract and obtaining adequate insurance;
- attempting to negotiate more favourable terms in carriage contracts.