

**CARRIAGE OF GOODS BY SEA -
CHANGES TO LAW IN AUSTRALIA**

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1 INTRODUCTION

On 1 July 1998, the **Carriage of Goods by Sea Regulations 1998 (Cth)** came into force, amending the operation of the **Carriage of Goods by Sea Act 1991 (Cth)** and the Hague-Visby Rules.¹ The road to that reform was a long and sometimes tortuous one. I must confess frankly at the outset that I am not sure that the end result was worth all the effort - not because the new regime is bad or flawed, I hasten to add, but because it will seldom be applied in Australia. Indeed, I think the changes to the law may be of more interest to our New Zealand members than our Australian ones. The changes that will have the most far-reaching effect in Australia appear to be unintended ones.

By way of introduction, I shall sketch out the process of reform that culminated on 1 July 1998, although I am sure it is familiar to most, if not all, members of this audience, many of whom were active participants in it.

In 1991, when Australia took its first steps forward from the original 1924 version of the Hague Rules, the intention was to have an interim period under the Hague-Visby Rules but then to move on to the Hamburg Rules. The *Carriage of Goods by Sea Act 1991 (Cth)* gave the force of law to the Hague-Visby Rules, but it also contained the now-famous (or infamous) "Hamburg trigger". The trigger was cocked by the Act's unusual commencement provision, which said that the Hamburg Rules would come into effect three years after the Act was passed (ie, on 31 October 1994) unless Parliament took steps before then to prevent that from

1 The Act and the Regulations refer to the rules as "the amended Hague Rules", but I shall stick with the name more commonly used in international maritime practice, the Hague-Visby Rules.

occurring. With two weeks left to go, on 17 October 1994, the House of Representatives passed a resolution that commencement of the Hamburg Rules should be deferred for another three years. On 19 October 1994, the Senate passed a similar resolution. That meant that the "Hamburg trigger" was recoiled to bring the Hamburg Rules into force on 19 October 1997 unless Parliament again took steps before then to prevent that from occurring.

It was fairly obvious to all that the Hamburg Rules were unlikely to come into force in 1997, however. In 1995, the Marine Cargo Liability Working Group was set up at an industry forum convened by the Department of Transport and Regional Development, with the aim of producing a set of amendments to the existing Hague-Visby Rules that would be acceptable to all those interested in the carriage of goods by sea. The Working Group had representatives from shippers, carriers, cargo insurers, maritime lawyers (represented by MLAANZ) and the Department of Transport and Regional Development. Its compromise package of reforms was published in October 1995, was endorsed by the relevant industry groups and the then Minister for Transport and Regional Development, and was circulated for public comment in mid-1996. It is that reform package that forms the core of the amendments that came into force on 1 July 1998.

The "Hamburg trigger" was finally uncocked on 15 September 1997, when the *Carriage of Goods by Sea Amendment Act* 1997 (Cth) was passed. The Amendment Act postponed the commencement of Hamburg Rules for an indefinite period² and made provision for regulations to modify the effect of the Hague-Visby Rules.³ A draft set of Regulations was circulated (to

² The Hamburg Rules are still in the amended Act, in Schedule 2. There is a slim possibility that they may yet be adopted. The Minister must conduct a review of the position at least every five years, considering the extent to which the Hamburg Rules have been adopted in other countries, particularly Australia's major trading partners, and consulting with "representatives of shippers, ship owners, carriers, cargo owners, marine insurers and maritime law associations" (s 2A(3)). Having conducted the review, the Minister must table a written report in both houses of Parliament, setting out his or her decision. If the decision is that the Hamburg Rules should be adopted, they will then come into force no later than twelve months after the tabling of the report.

³ Strictly speaking, of course, Australian legislation cannot modify the Rules, which were made by international convention. The amended Act makes this point in s 7(2), but goes

a restricted audience) for comment in early 1998, and a modified version of them was eventually made by the Governor-General on 30 June 1998, to come into force on the following day.

Some of the legislative techniques used in this saga were unusual, to say the least. It is most uncommon for Acts to contain "trigger" provisions of the kind found in the 1991 Act, or for them to allow for their own partial repeal or postponement by Parliamentary resolution rather than by amending legislation. The latest amendments are just as exotic in terms of legislative technique. The Amendment Act delegates to the Governor-General (advised by the Minister and his or her Department, of course) the power to make regulations amending the operative provisions of the Act itself.⁴ That is so unusual that the Department thought it necessary to seek confirmation from the Senate Standing Committee for the Scrutiny of Bills that it was an acceptable delegation of legislative power. There was little or no alternative to using regulations to amend the Act itself, because legislation to implement the whole of reform package would simply not have been ready in time to beat the "Hamburg trigger" in October 1997. Nevertheless, it is unfortunate, in my opinion, that the reforms were done by regulation rather than in the Act itself. Although provision has been made for a Schedule of Modifications to be added to the Act, the fact remains that the substantive changes to the Hague-Visby Rules have been made at the level of delegated legislation, thereby making it more difficult for non-Australians to find and read the relevant text.

The substantive modifications to the operation of the Hague-Visby Rules can be grouped under the following broad headings:

- the Rules now apply to contracts contained in or evidenced by a range of non-negotiable documents, as well as to bills of lading and similar negotiable documents of title;

on to provide the original text of the Hague-Visby Rules has effect for the purposes of the Act "as if it were modified in accordance with the Schedule of Modifications".

⁴ The Department of Transport and Regional Development referred to these delegating provisions as "Henry VIII clauses", a reference to the delegation of power by the English Parliament to Henry VIII to amend legislation with which he did not agree.

- the Rules apply to electronic documents in exactly the same way as they do to paper documents, even if no printed "hard copy" is ever produced;
- the scope of application of the Rules is extended beyond the traditional "tackle to tackle" period to include any period before loading or after discharge when the goods are in the carrier's charge within the limits of a port or wharf;
- the Rules now apply to deck cargo if the shipper tells the carrier at or before the time of booking of any specific stowage requirements and the carrier agrees to those requirements in writing;
- the Rules now make explicit provision for (limited) liability for delay.

I shall say something about each of these substantive changes, but most of my remarks in this paper will be general ones about the operation of the Act and the Rules as a whole.

2 WHEN WILL THE NEW VERSION OF THE RULES APPLY?

The amended Act contains provisions applying the amended Hague-Visby Rules in some of the following three situations, each of which is dealt with separately below:

- outward-bound international carriage of goods from Australia;
- inward-bound international carriage of goods to Australia;
- interstate carriage of goods.

2.1 Outward-bound international carriage from Australia

Article 10 of the Rules has been amended to read:

"Subject to paragraph 6, these Rules apply to sea carriage documents relating to the carriage of goods from ports in Australia to ports outside Australia, regardless of the form in which the sea carriage document is issued."

"Sea carriage document" is broadly defined by a new Art 1, r 1(g) to include bills of lading, non-negotiable bills of lading, consignment notes, sea waybills and ship's delivery orders. Thus, the new version of the Rules will apply to all kinds of outward-bound international carriage of goods, no matter what kind of contract is used *except* that it will not apply to carriage under charterparties. Paragraph 6 of Article 10 provides that the Rules do not apply

to carriage under a charterparty "unless a sea carriage document is issued for the carriage", and Art 10, r 7 provides that the Rules only apply to that sea carriage document if it is a negotiable one.⁵ Thus, the amended Rules will not apply to outward-bound carriage under a voyage charterparty unless a bill of lading (or similar document of title) has been issued for the carriage, and then they will only apply when that bill of lading is in the hands of a party other than the charterer.⁶

These provisions will obviously be applied by an Australian court if an action is brought in Australia, but most actions in relation to outward-bound international carriage from Australia are brought in the country of destination. How often will a court in the country of destination feel obliged to apply Australian law and the new Australian version of the Hague-Visby Rules? Obviously, if the sea carriage contract (bill of lading, waybill, etc) contains a clause choosing Australian law and/or a clause incorporating the Hague-Visby Rules as enacted by the *Carriage of Goods by Sea Act* 1991 (Cth) (as amended), then any tribunal in the country of destination should apply the newly modified version of the Rules.⁷

⁵ The amended Art 5 also provides that the Rules do not apply to charterparties but they do apply to "negotiable sea carriage documents" issued for charterparty carriage.

⁶ That was the position under the old Hague-Visby Rules, but it is articulated with greater clarity now. The new Art 1, r 1(b) provides that the Rules apply to a negotiable sea carriage document issued under a charterparty "from the moment at which that document regulates the relations between its holder and the carrier concerned". Similarly, Art 10, r 7 provides that the Rules only apply to a negotiable sea carriage document while it regulates the relationship between the holder of it and the carrier. A negotiable sea carriage document (ie, a bill of lading or similar document of title) does not "regulate the relations" between a voyage charterer and the disponent owner, because the contract of carriage between those parties is the charterparty, not the bill of lading: see *Gardner Smith Pty Ltd v The Ship Tomoe* 8 (1990) 19 NSWLR 588; *Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd* (1993) 117 ALR 507 at 510, per Sheppard J.

⁷ The case would then be like *Furness Withy (Aust) Pty Ltd v Metal Distributors (UK) Ltd (The Amazonia)* [1990] 1 Lloyd's Rep 236, where the High Court in England applied Australian law because the sea carriage contract in question incorporated the Australian Act as a whole, not just the Hague Rules (as they then were). The most recent version of the BHP Transport standard form bill of lading contains a Clause Paramount in terms similar to those described in the text: see cl 5(A).

If, however, the sea carriage contract contains a clause choosing a non-Australian law and/or a clause incorporating the original text of the Hague-Visby Rules, it is much less obvious that a court in another country will feel obliged to apply the Australian version of the Rules. For example, what would an English court or arbitral tribunal do if faced with a bill of lading for carriage from Australia to England, choosing English law and incorporating the "ordinary" Hague-Visby Rules by reference? So far as Australian law is concerned, such a bill of lading would be governed by Australian law and the modified version of the Rules,⁸ but would an English tribunal find any reason to consider Australian law at all? It is unlikely that an English court or arbitrator would find any reason to look beyond the terms of the contract itself. Thus, they would probably apply English law and the "ordinary" Hague-Visby Rules.

That is precisely what happened (albeit in a different context) in the English High Court in *Akai Pty Ltd v People's Insurance Co Ltd*.⁹ That case was concerned with an insurance contract containing a clause choosing English law as the governing law. So far as Australian law was concerned, that choice of English law was invalid because of provisions in the *Insurance Contracts Act* 1984 (Cth); the High Court of Australia decided as much in its own decision entitled *Akai Pty Ltd v People's Insurance Co Ltd*.¹⁰ Despite the fact that the High Court of Australia had declared the contract to be governed by Australian law, not English law, the High Court in England subsequently held that the contract was governed by English law. Thomas J found no reason to look beyond the choice of English law clause that appeared on the face of the contract itself, saying:¹¹

"In my judgment...this Court should give effect to the bargain of the parties and their freely negotiated choice of law and jurisdiction. It should not, as a matter of comity, give effect to the decision of the High Court [of Australia] that overrode that bargain and that choice."

⁸ By *Carriage of Goods by Sea Act* 1991 (Cth), ss 11(1)(a), 10(1)(b)(i) and Art 10, r 1, respectively.

⁹ [1998] 1 Lloyd's Rep 90.

¹⁰ (1996) 188 CLR 418.

¹¹ [1998] 1 Lloyd's Rep 90 at 100.

Although Australians might want to disagree with Thomas J's views about comity (and, indeed, his views about what amounts to a "freely negotiated" contract), they can hardly be surprised at such a decision. They certainly ought to expect similar decisions in relation to the amended *Carriage of Goods by Sea Act* 1991 (Cth). The United Kingdom is unlikely to be the only country to place greater weight on the choice of law clause in the sea carriage contract than on the Australian Act (unless, of course, the contract chooses an Australian law). Most legal systems give priority to the parties' own express choice of law. Indeed, the European countries that are signatories to the Convention on the Law Applicable to Contractual Obligations 1980 (usually known as the Rome Convention) are required to do so. Few countries' courts would be game enough to override an express choice of law clause by applying a foreign piece of legislation of its own force. It will be particularly interesting to see what attitude the New Zealand courts take to these questions, as they will probably be called on to consider them first.

If an *Akai*-like fate does await the amended Act overseas, the end result may be that more cases in relation to outward-bound international carriage from Australia will be brought in Australia. Most of the changes to the Act are more favourable to the cargo claimant than to the carrier, and it is the cargo claimant (or rather its insurer) which chooses the jurisdiction in which the recovery action is brought. Let us return, for example, to our bill of lading for carriage from Australia to England, choosing English law and incorporating the "ordinary" Hague-Visby Rules by reference. Imagine a cargo claim under this contract, in relation to damage occurring after discharge but before delivery, in the container yard at the English port of discharge. Imagine also that the bill of lading excludes the carrier's liability completely for any damage occurring after discharge over the ship's rail, and that it also contains a standard Himalaya clause. If the plaintiff were to pursue its claim in the English courts, it would face a difficult task indeed. The court would probably take the view that the contract is governed by English law, and would refuse recovery by applying the terms of the bill of lading contract to damage occurring outside the traditional Hague-Visby "tackle to tackle" period. If, however, the plaintiff were to pursue the same claim in an Australian court, it could expect a much more friendly reception. An Australian court would apply the new Australian version of the Hague-Visby Rules, which extend beyond the "tackle to tackle" period to cover damage

in the port at either end.¹² It would refuse the carrier the right to rely on the post-discharge exclusion clause in its bill of lading, because it is inconsistent with the terms of the Rules, and thus would be struck down by Art 3, r 8. Provided the claim were large enough to make it worth the cargo insurer's while to pursue recovery in the country of shipment rather than the country of destination, an action in Australia seems much more likely than an action in England. (It is a little unseemly to point this out in such a gathering, but it may well be that many claims that would normally be brought in New Zealand may find their way back to Australia for this reason.)

2.2 Inward-bound international carriage to Australia

The basic scheme of the Hague and Hague-Visby Rules has always been to look to the regime in force in the country of shipment.¹³ The amended version of the Act continues that basic scheme, the newly-drafted Art 10 r 2 providing:

"Subject to paragraph 6, these Rules apply to the carriage of goods by sea from ports outside Australia to ports in Australia unless one of the Conventions mentioned in paragraph 3 (or a modification of such a Convention by the law of a contracting State) applies, by agreement or by law, to the carriage, or otherwise has effect in relation to the carriage."

The Conventions mentioned in paragraph 3 are those giving effect to the Hague Rules, the Hague-Visby Rules and the Hamburg Rules.¹⁴ Thus, sea carriage contracts for inward-bound international carriage to Australia will be governed by the "ordinary" Hague, Hague-Visby or Hamburg Rules if those rules would apply to the contract "by agreement or by law". To put it the other way around, the Australian modification will apply to inward-bound contracts only if they would not otherwise be governed by the Hague, Hague-Visby or Hamburg Rules.

¹² See para 4.3 below.

¹³ The USA has always been a notable exception, applying the *Carriage of Goods by Sea Act* 1936 (US) to inward-bound as well as outward-bound international carriage.

¹⁴ Respectively, (a) the Brussels Convention 1924, (b) the Brussels Convention as amended by either the Visby Protocol 1968 or the SDR Protocol 1971 or both, and (c) the Hamburg Convention 1978.

There are very, very few maritime countries that have not adopted either the Hague, the Hague-Visby or the Hamburg Rules.¹⁵ There are several, however, that have modified the Rules in one way or another, just as Australia has now done. Will the Australian modified version apply to inward-bound carriage from such countries? If the words in brackets had not been added to Art 10 r 2,¹⁶ the answer would have been Yes - the Australian version of the Hague-Visby Rules would have applied whenever the unamended Conventions did not. The words in brackets now make it clear that if a country has modified one of the Conventions in some way (as Australia has now done), and if that country's modified version of the Rules governs the carriage to Australia "by agreement or by law", then the Australian modification will not apply and the foreign modification will.

Article 10 r 2 provides that the Australian modification does not apply to inward-bound carriage if that carriage is governed by "a modification of" one of the three Conventions. What will happen in relation to inward-bound carriage from a country that has adopted bits and pieces of all three Conventions, melding them together into a genuine hybrid of all three, as China and Vietnam have done in their respective maritime codes?¹⁷ Could carriage from China to Australia be said to be governed by "a modification of" one of the Conventions?¹⁸ If not, the Australian modification of the Hague-Visby Rules will apply.

A similar question may soon arise in relation to carriage into Australia from the USA. As Dr Frank Wiswall will explain in the next session,¹⁹ a Bill was introduced into the US Congress

¹⁵ Thailand seems to be one example in this part of the world. Taiwan is another.

¹⁶ They did not appear in the first draft of the Regulations.

¹⁷ See Li, "The maritime code of the People's Republic of China" [1993] LMCLQ 204.

¹⁸ The answer would be Yes if the carriage were to be done under the standard form COSCO bill of lading. Clause 3 of that bill provides that it is governed by the laws of the PRC, but cl 7(1) of the bill is a Clause Paramount applying the unamended Hague Rules as set out in the Brussels Convention. The Chinese Maritime Code allows parties to contract out of its terms by such a provision (see Li, above n 17), so international carriage into Australia under a COSCO bill of lading would be governed by the Hague Rules "by agreement", if not "by law".

¹⁹ Business Session No 2, Dr Frank Wiswall, "Carriage of Goods by Sea - Changes Considered by CMI and Recent Changes to US Law".

this year which, when passed, will effect substantial changes to the US *Carriage of Goods by Sea Act* 1936. The US Act presently gives the force of law to the original Hague Rules. The new Bill rewrites the Hague Rules so fundamentally that one can properly ask to what extent they are still recognisably the Hague Rules at all. The proposed new American rules combine some of the original 1924 provisions with some modelled on the Visby amendments, some modelled on the Hamburg Rules, and a great many new provisions drafted afresh for the first time. When passed, will this Bill be "a modification of" the Hague Rules, or will it be something new entirely? Unless it can be seen to have retained enough connection with the original Rules to be regarded as "a modification of" them, inward-bound carriage to Australia from the USA will be governed by the Australian modification of the Hague-Visby Rules rather than the new American rules.

2.3 Interstate carriage

The amended version of the Hague-Visby Rules will apply to sea carriage from one Australian port to another, but not to intra-State or intra-Territory carriage.²⁰ They will *not* apply to interstate sea carriage under a consignment note. The provisions relating to consignment notes are new. Their effect is rather complicated, because one must follow references from one provision to another. A new s 10(1A) provides that if a contract for sea carriage from a port in one Australian State or Territory to a port in another Australian State or Territory is contained only in (or evidenced only by) a consignment note, the amended Hague-Visby Rules apply to that contract only if Art 10 r 5 so requires. Article 10 r 5 provides that the amended Hague-Visby Rules only apply to such carriage if two requirements are satisfied:

- (a) there has been or is to be international on-carriage to or from Australia; *and*
- (b) if the goods have been declared to the carrier in writing to be international cargo.

A sea carriage contract only constitutes a "consignment note" for these purposes if the four conditions set out in Art 1, r 1(aa) are satisfied:

- that the document is non-negotiable;
- that it is clearly marked as being non-negotiable;

- that no bill of lading or similar negotiable document of title has been issued;
- that the document clearly states that the carrier will accept no liability for any loss of, damage to or delay of the goods.

The combined effect of these provisions is that a cargo-owner and carrier may agree for goods to be carried from one Australian port to another (in a different State or Territory) on "no liability" terms if the contract clearly says so. (Contracting on these terms will (or should) obviously affect the freight rate charged by the carrier.) If the interstate carriage is one leg of an international voyage, either into or out of Australia, the cargo-owner is entitled to insist that it be done on the terms of the amended Hague-Visby Rules, no matter what the consignment note itself says. The cargo-owner can do that by declaring the goods in writing to be international cargo, in which case the amended Hague-Visby Rules will apply by virtue of Art 10 r 5.

3 AN UNINTENDED CHANGE TO THE ACT ITSELF?

One consequence of the amendments to the Act appears to be dramatic, but unintended. The jurisdictional protection provided to Australian receivers of goods seems to have been reduced quite drastically, which was definitely not part of the proposed reform package. That protection is provided by s 11 of the Act, which (like its predecessor s 9 of the *Sea-Carriage of Goods Act* 1924 (Cth)) is designed to give Australian cargo plaintiffs guaranteed access to Australian courts, whatever choice of forum clause the sea-carriage contract may contain. Section 11 used to use the phrase "a bill of lading or a similar document of title". The Regulations have replaced that phrase with "a sea carriage document to which, or relating to a contract of carriage to which, the amended Hague Rules apply".²¹ The problem is that, as amended by the Amendment Act in 1997, s 7(1) provides that "the amended Hague Rules" consist of "the text set out in Schedule 1, as modified in accordance with the Schedule of Modifications referred to in subsection (2)". The combined effect of ss 7 and 11 is that Australian cargo plaintiffs now only have guaranteed access to Australian courts if the contract on which they are suing incorporates *the Australian modification of the Hague-*

Visby Rules. As I have attempted to show in para 2.2 above, very few Australian receivers of goods are in that position.²²

This point may be made more clearly by means of an example. Imagine a bill of lading for carriage of goods from Japan to Australia. The bill of lading contains a typical Clause Paramount incorporating the original version of the Hague-Visby Rules, and a forum clause providing that all disputes between the parties must be resolved by litigation in Tokyo. The goods arrive in damaged condition and their Australian receiver wants (as most receivers would) to bring proceedings in Australia. Section 11 no longer provides the receiver with guaranteed access to Australian courts, as it would have before the amendments. If the receiver were to proceed in Australia, the carrier could seek a stay of proceedings, and there seems to be nothing in s 11 to preclude the grant of a stay. In its amended form, s 11(2)(c)(i) now provides:

"An agreement (whether made in Australia or elsewhere) has no effect so far as it purports to:

...

- (c) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of:
 - (i) a sea carriage document to which, or relating to a contract of carriage to which, the amended Rules apply, relating to the carriage of goods from any place outside Australia to any place in Australia."

Does our Japanese bill of lading fall within s 11(2)(c)(i)? Apparently not. It is a sea carriage document for inward-bound carriage to Australia, but it is *not* governed by "the amended Rules", as that term is defined by s 7(1). It is governed by the Hague-Visby Rules, not the Hague-Visby Rules as amended in the Schedule of Modifications.

to also see Davis "Two Afterthoughts" after this paper.

²² Australian shippers of outward-bound international goods will still be able to rely on s 11, because their contracts will be governed by the Australian modification of the Hague-Visby Rules: see para 2.1 above.

retained material to this act simply shows this possible effect was not considered, but that if the result was intended. Davis has a lot to say about this result was unintended & amendment would be considered. After saying this result was obviously unintended, judge made but grant stay. Paragraph 2. says result is obviously unintended, judge made but grant stay (which is discretionary).

The same result would flow even more clearly for inward-bound carriage to Australia under a bill of lading governed by the unamended Hague Rules (for example, from the USA or India), which is very clearly not "a sea carriage document to which, or relating to a contract of carriage to which, the amended Rules apply". Equally, the Act would not provide any jurisdictional protection to an Australian receiver of goods carried under a non-negotiable carriage contract, such as a sea waybill or a "straight" bill of lading unless that contract incorporates the Australian modifications of the Hague-Visby Rules.²³

I am fairly sure that these consequences were not intended. If they were, it is difficult to see what point there was in introducing the new s 11(3), which specifically provides that Australian arbitration clauses are not rendered ineffective by s 11(2). As I have tried to show, there is no longer anything in the amended s 11(2) to strike down a clause providing for arbitration in London, New York or Tokyo, either. Until these consequences of the amendments are remedied, cargo claimants in Australia will be vulnerable to preliminary jurisdictional points in a way they have not been since 1924, when s 9 of the *Sea-Carriage of Goods Act* 1924 (Cth) was first passed.

4 THE CHANGES THEMSELVES

The substantive changes are, I suspect, fairly familiar to most members of the audience, as the reform package was distributed widely and discussed extensively before it was finally implemented this year. Nevertheless, I will make a few comments about each of the changes.

4.1 Expanding the range of contracts to which the Rules apply

In their unamended form, the Hague and Hague-Visby Rules apply only to "bills of lading and similar documents of title". Negotiable sea-carriage documents of this kind were used widely (indeed, almost exclusively) when the Rules were first made in 1924, and that was still true (albeit to a lesser extent) when the Visby amendments were made in 1968. In more recent years, however, there has been an increasing use of non-negotiable sea-carriage documents such as sea waybills and "straight" bills of lading. Most sea waybills incorporate the Hague or

²³ Sections 10(1)(b)(iii) and 11(2)(c)(ii) are the paragraphs that refer to non-negotiable sea carriage documents. Both refer to contracts governed by "the amended Hague Rules", so the argument in the text works in the same way.

Hague-Visby Rules by reference, but it was obviously more desirable to make the Rules apply compulsorily than to rely on their voluntary inclusion by the carrier. Accordingly, the amended Act applies the new version of the Rules to a broad range of sea carriage documents, both negotiable and non-negotiable.

This was done by amending the operation provision of the Rules (Art 10), and also the definition of "contract of carriage" in Art 1, r 1(b). Article 10 r 1 provides that the Rules apply to "*sea carriage documents* relating to the carriage of goods from ports in Australia to ports outside Australia, regardless of the form in which the sea carriage document is issued" (emphasis added). "Sea carriage document" is broadly defined by a new Art 1, r 1(g) to mean bills of lading or similar documents of title, non-negotiable bills of lading, or non-negotiable documents (including consignment notes, sea waybills and ship's delivery orders), if they contain or evidence a contract of carriage of goods by sea. The expanded scheme of the Rules is then given the force of law by the amended s 10(1)(b), which provides that the Rules apply to contracts to which Art 10 applies.

In short, the modified Hague-Visby Rules now apply to all kinds of outward-bound international carriage of goods by sea, no matter what type of contract is used (except, of course, charterparties, which are excluded by Art 10 r 6).

The equivalent provision for inward-bound carriage (Art 10 r 2) is curiously different. As I have indicated above, in para 2.2, the Rules will very seldom apply to inward-bound carriage. If, however, the precondition in Art 10 r 2 is satisfied (ie, that there is carriage into Australia that is not governed by the Hague, Hague-Visby or Hamburg Rules or "a modification of" them), it seems that the Rules will apply whether or not a sea-carriage document is used at all. Where Art 10, r 1 refers to "sea carriage documents", Art 10, r 2 refers to "carriage of goods by sea", making no reference to "sea carriage documents". "Carriage of goods by sea" is defined in Art 1, r 1(e) to cover the whole of the extended period described in para 4.3 below, but it makes no reference to carriage under any kind of document. Thus, it seems that the amended Rules apply to inward-bound *carriage* under Art 10, r 2, rather than inward-bound *carriage documents*. This oddity is unlikely to prove significant in practice, however: it is

unlikely that the precondition in Art 10, r 2 will often be satisfied, and even less likely that it will be satisfied in a case where no sea-carriage document is issued at all.

The expanded definition of "sea carriage document" in Art 1, r 1(g) is given plenty of work to do, because the amended version of the Rules uses that expression wherever the original Hague-Visby Rules used the words "bill of lading".²⁴ Hence, all the operative provisions of the Rules apply on their face to "sea carriage documents", not "bills of lading". There is only one place where the words "bill of lading" have not been replaced with "sea-carriage document", and that is in Art 3, r 7. Although the reason for continuing to use the phrase "bill of lading" is obvious, the amended version of Art 3, r 7 now has a curious effect.

The amended version of Art 3, r 7 now reads as follows:

"After the goods are loaded *the sea-carriage document* ~~bill of lading~~ to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article 3, shall for the purpose of this article be deemed to constitute a 'shipped' bill of lading."

The intention of Art 3, r 7 is to make provision for the common practice by which a "received for shipment" bill of lading is turned into a "shipped" bill of lading, either by surrendering the

²⁴ Occasionally, the amended Rules refer specifically to *negotiable* "sea carriage documents", where the context requires it. For example, the second sentence of Art 3, r 4 abrogates the rule in *Grant v Norway* (1851) 10 CB 665; 138 ER 263 by providing that a carrier cannot adduce evidence to contradict the representations in the bill of lading when it has been transferred to a third party acting in good faith. The reference to "transfer" of the original document to a third party obviously contemplates a negotiable document, so the words "bill of lading" have been replaced with "negotiable sea carriage document".

former for the latter or (much more commonly these days) by stamping or writing "shipped on board" on the "received" bill with the relevant details about shipment. It was obviously necessary to retain the reference to "a 'shipped' bill of lading" in the body of Art 3, r 7, because that is what the rule is intended to refer to, even under the newly amended regime. If the shipper needs a "shipped" bill of lading in order to ensure the negotiability of the document (for example, if a letter of credit opened for the shipper's benefit expressly stipulates presentation of a shipped bill of lading), then it must be entitled to demand one.

However, the words "bill of lading" have been changed to "sea carriage document" at the first place where they appeared in the old Art 3, r 7. When one remembers that a "sea carriage document" includes all kinds of non-negotiable documents, one can see the rather odd effect that Art 3, r 7 now has. The shipper of goods under a non-negotiable sea carriage document is entitled by Art 3, r 7 to demand that the carrier issue a shipped bill of lading. It does not have to surrender the old non-negotiable document, because Art 3, r 7 only requires it to surrender any document of title that it was previously given. If the carrier has already issued a non-negotiable contract document, it may thus find itself in something of a bind. The non-negotiable document (say a sea waybill or "straight" bill of lading) evidences a contract obliging it to deliver to the named consignee. The shipper may, however, insist on the issue of a negotiable bill of lading imposing the very different contractual obligation on the carrier to deliver to the shipper's order. It seems that the carrier cannot refuse to issue the bill of lading, but it cannot demand surrender of the conflicting non-negotiable document. Again, I imagine that this situation is unlikely to arise much in practice, or to cause too many problems if it does, but it is undoubtedly a peculiarity.

4.2 Electronic documents

It would have been foolish to amend the Rules in the late 1990s without making provision for electronic documents, which are already becoming increasingly significant and will surely become more so in the coming decades. The difficulties of producing a secure system of negotiable electronic documents (electronic bills of lading) remain as intractable as ever, but my personal view is that they will soon be side-stepped by an increased use of electronic non-negotiable sea-carriage documents. A bill of lading (electronic or paper) is really only

necessary if the parties need to use it as the means of transferring property in the goods and securing payment for them. Personally, I think that new methods of securing payment will be developed that will render bills of lading redundant altogether. Whether or not I am right about that, it is encouraging to see the Act and the amended Rules make such thoroughgoing provision for an electronic future.

This has been done by the introduction of a new Art 1A and a new definition (Art 1, r 1(ba)) in Art 1. Article 1A, r 1 provides that the amended Rules apply, “with any necessary changes, to a sea carriage document in the form of a data message in the same way as they apply to such a document in printed form”. “Data message” is broadly defined by Art 1, r 1(ba) to mean:

“information generated, stored or communicated by electronic, optical or analogous means (including electronic data interchange, electronic mail, telegram, telex or telecopy) even if the information is never reproduced in printed form”.

The closing words of Art 1, r 1(ba) are the ones that show how whole-heartedly the new scheme has embraced the idea of electronic commerce. If electronic documents are used, it is never necessary to print them out in hard copy.

On a lighter note, I am slightly intrigued by the use of the word “optical”. I presume that this is a reference to optical fibre technology, which I freely confess I do not understand at all. On its face, though, the word “optical” in the new Art 1, r 1(ba) does seem to open up the possibility of video sea-carriage documents.

4.3 Beyond “tackle to tackle”

The unamended Hague and Hague-Visby Rules apply only in the “tackle to tackle” period defined by the old Art 1(e), which defined “carriage of goods” as extending only from “the time when the goods are loaded on to the time they are discharged from the ship”. If the carrier has any contractual obligations outside that period, they are governed by the terms of the bill of lading unaffected by the Rules. Once again, this limited scope of coverage made sense in the pre-container era in which the Rules were originally drafted, but it makes no sense in the 1990s, when the shipper and receiver of general cargoes (other than some breakbulk

cargoes) seldom give or take possession of the goods at the ship's side. Accordingly, the amended regime extends the obligations of the Rules beyond the traditional "tackle to tackle" period to include any period before loading or after discharge when the goods are in the carrier's charge within the limits of a port or wharf.

This has been done (or is intended to be done) by changing the definition of "carriage of goods" in Art 1, r 1(e). Without wanting to sound carping, it seems that there has been an inadvertent slip here, too. As amended by the Regulations that came into force on 1 July 1998, Art 1, r 1(e) now reads:

"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.~~"

It seems to me that the reference to para 2 should be a reference to para 3.²⁵ Paragraph 2 articulates when goods are taken to be delivered to a consignee. It is para 3 which states the period in which the carrier is regarded as being in charge of the goods, using these terms:

"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 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."

For Australia, "the limits of a port or wharf" are those set for the purposes of the *Customs Act* 1901 (Cth) (see Art 1, r 4) or, if that would produce what the Rules now call "an

²⁵ The slip seems to have arisen in the redrafting that took place between the first draft set of regulations and the set that was eventually made on 30 June 1998. What is now para 3 used to be para 2; the definition of delivery to a consignee was expanded in the redraft, but it was then inserted as para 2 rather than para 3 or 4, and the cross-reference to para 2 in para 1(e) was not changed.

anomalous result", by an instrument created by the Minister (see Art 1, r 5). For ports outside Australia, "the limits of a port or wharf" are those fixed by local law: see Art 1, r 6.

The effect of these provisions²⁶ is to extend the operation of the Rules from "tackle to tackle" to "container yard to container yard", in the case of containerised cargoes. One consequence of that will be that there can no longer be any doubt about what is the limitation period in relation to claims arising after discharge from the ship but before delivery to the consignee or its agent. Under the unamended Hague and Hague-Visby Rules, there is a vexed question about the operation of Art 3, r 6, which states that the one-year limitation period runs from "delivery" (or when delivery should have been made), despite the fact that the Rules as a whole do not apply after discharge because of the unamended Art 1, r 1(e).²⁷ That conceptual difficulty will no longer arise when the amended Rules apply.

I have heard it said that the extension of the Rules beyond the "tackle to tackle" period may make the Himalaya clause redundant, because it will no longer be necessary to extend the carrier's protection to stevedores when the carrier's own contractual obligations extend to cover the period when the goods are in the stevedores' hands. I think it would be precipitate to do away with Himalaya clauses just yet, however. It should be remembered that the extended period of operation of the Rules will very seldom apply to inward-bound cargoes to Australia, as explained in para 2.2. For inward-bound international cargoes, the compulsory

²⁶ I assume that the mistaken cross-reference from Art 1, r 1(e) to Art 1, r 2 will either be read as a reference to Art 1, r 3 or will be corrected. In *Lindner v Wright* (1976) 14 ALR 105, a cross reference in a section of an Act to subs (3) should obviously have been to subs (4), and Muirhead J was prepared to read it as if it said subs (4): see D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (Butterworths, 4th ed, 1996), para [2.14].

²⁷ The English Court of Appeal has held that Art 3, r 6 does apply to claims occurring after discharge but before delivery (*Compania Portorasti Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 1 Lloyd's Rep 311) and the Court of Appeal of New South Wales has expressed strong obiter support for that view (*PS Chellaram & Co Ltd v China Ocean Shipping Co (The Zhi Jiang Kou)* [1991] 1 Lloyd's Rep 493 (point not considered on appeal to the HCA)), but in *Kamil Export (Aust) Pty Ltd v NPL (Australia) Pty Ltd* [1996] 1 VR 538 the Appeal Division of the Supreme Court of Victoria held that Art 3, r 6 does *not* apply to claims arising after discharge.

operation of the Rules will still stop at the end of discharge, making the need for a Himalaya clause appear as pressing as ever to carriers and stevedores.

4.4 Deck cargo

The unamended Hague and Hague-Visby Rules do not automatically apply to deck cargo, which was always regarded as a specially hazardous case in the days before containerised cargoes. The definition of "goods" in Art 1(c) of the original Conventions excludes "cargo which by the contract of carriage is stated as being carried on deck and is so carried". This, too, seems rather anachronistic in an era when containers are routinely carried above deck. Accordingly, the amended Rules make fairly elaborate provision for their operation to deck cargo.

Article 1(c) has been amended by removing the passage quoted above. The basic position is now that the amended Rules apply to goods carried on or above deck.²⁸ The shipper and carrier may, however, contract out of the operation of the Rules in relation to deck cargo if (a) the goods must be carried on deck, and (b) the character or condition of the goods reasonably justifies a special non-Hague-Visby agreement in relation to them: see Art 6A, r 1. That cannot occur simply because the goods are containerised, however, even if that means that the goods must be carried on deck for that particular voyage. This is spelled out in Art 6A, r 2(a). Thus, containers carried on or above deck in the ordinary way are governed by the amended Rules. There can only be a special agreement to contract out of the amended Rules in relation to containerised cargo that will not fit within the ordinary cell guides, or in relation to breakbulk cargo: see Art 6A, r 2(a),(b). Any such special agreement is only effective if the sea-carriage document for the carriage bears an indorsement on its face stating that there is a special deck carriage agreement in operation: see Art 6A, r 3.

If the carrier has expressly agreed with the shipper (at or before the time of booking the cargo) to carry the goods *below* deck, it loses the protection of the immunities and limitations of

²⁸ A new Art 2, r 2 has been added, stating that for the purposes of Art 2 r 1 (which is the rule imposing the obligations of the Rules on the carrier and entitling it to the immunities conferred by the Rules), "'goods' includes goods (except live animals) carried on or above deck".

liability in the Rules if it then carries the goods on or above deck: see the new Art 2, r 4. If the shipper has specific stowage requirements for goods to be carried on or above deck, it must tell the carrier in writing at or before the booking of the cargo or else the Rules will not apply to the goods at all: see Art 2, r 3.

4.5 Delay

Liability for delay has long been a grey area in the original versions of the Hague and Hague-Visby Rules, which make no reference to delay (unlike the Hamburg Rules). There is nothing in the original version of the Rules to suggest that there *cannot* be liability for delay, and there are reported instances of carriers being held liable for delay losses.²⁹ Nevertheless, it was clearly a good idea to articulate clearly when and how the carrier is to be liable for delay, and that is done in the amended Rules by the inclusion of a new Art 4A.

Article 4A provides that the carrier is liable for loss caused by unreasonable delay unless it (the carrier) can prove that the delay was excusable by one of eight (and only eight) excuses, *and* that it took all reasonable measures to avoid the delay. The eight excuses are:

- deviation authorised by the shipper;
- circumstances beyond the reasonable control of the carrier or its servants or agents;
- reasonable necessity for compliance with an express or implied warranty (in what contract, it is not clear);
- reasonable necessity to save the ship or its cargo;
- saving human life or aiding a ship in distress;
- reasonable necessity for obtaining medical or surgical aid for a person on board; barratrous conduct of master or crew;
- industrial action if that action was not substantially caused or contributed to by the carrier's unreasonable conduct.

If the carrier is liable for delay, its liability is limited to whichever is the *smallest* of the following three sums:

²⁹ See, eg, SS Ardennes (Cargo Owners) v SS Ardennes (Owners) [1951] 1 KB 55.

- the actual amount of the loss caused by the delay;
- 2.5 times the sea freight payable for the delayed goods;
- the sea freight for all the goods shipped by the shipper under the contract in question.

5 CONCLUSION

There can be no doubt that the Hague-Visby Rules are in need of a radical overhaul, or even complete replacement by a new international convention. Australia's attempt to bring the Hague-Visby Rules up to date has been carefully thought out. It is moderate and balanced between competing interests. It may seldom be applied, however, unless claims that would otherwise be brought overseas find their way back to Australia. It is symptomatic of the gradual crumbling of international uniformity on the law governing carriage of goods by sea. Until that crumbling is arrested by the adoption of a new international consensus, carriage of goods claims will become even more complicated than they already are, as they become overlaid with increasingly complex conflicts of laws issues arising out of the slight but significant differences between national regimes. Whether the new consensus is brokered by CMI or the UN or both, it cannot come too soon.

Ch. Frank Viswell - Has Australia acceded without
notification to the Vienna Convention on 9th.
Convention? (He thinks not but is not sure).
- This could affect which version of Hague-Visby
applies - the original or the modified version.

CARRIAGE OF GOODS BY SEA: CHANGES TO THE LAW IN AUSTRALIA

by Martin Davies

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1 Two afterthoughts

Since submitting my written paper to the conference organisers, I have had two further thoughts about Section 3 of that paper, which is entitled "An unintended change to the Act itself?" I am grateful to my colleague Geoff Lindell of the University of Melbourne Law School, and also to Ernie van Buuren and Glenn O'Brien of the Maritime and Trade Law Group of Mallesons Stephen Jaques in Melbourne, for their assistance in helping me to think through these issues.

1.1 What claims are affected?

It seems to me that (subject to what I say below in 1.2) all claims are affected, not just those arising after 1 July 1998 (the day on which the amendments came into force). The test for determining whether legislation should be given what is often called "retrospective" operation was recently stated as follows by Deane, Dawson, Toohey and Gaudron JJ in **Victrawl Pty Ltd v Telstra Corp Ltd** (1996) 183 CLR 595 at 615:

"The relevant question...is whether the provision's operation is merely procedural in the sense that it would not, if given unconfined operation, affect pre-existing substantive rights or liabilities. It is only if a statutory provision is merely procedural in that narrow sense that the ordinary presumption against retrospective operation is inapplicable."

According to this test, s 11 of the **Carriage of Goods by Sea Act 1991 (Cth)** is plainly a procedural provision, in my opinion. If the amendments discussed in the main paper were to be "given unconfined operation", it is arguable they would not affect pre-existing substantive rights and liabilities at all. A cargo claimant might no longer be able to resist the carrier's application for a stay of Australian proceedings, but its substantive rights and liabilities would

be (or should be) exactly the same - namely, those given by the version of the Hague or Hague-Visby Rules in force in the country of shipment.

This point may be made more clearly by a return to the example used on pp 12-13 of the main paper, that of the bill of lading for carriage from Japan to Australia, containing a Clause Paramount and a choice-of-Tokyo-courts clause. Imagine that proceedings have been brought in Australia in the name of the receiver of the goods, and that those proceedings were brought at some time before 1 July 1998. Until 1 July 1998, it would have been futile for the carrier to seek a stay of the Australian proceedings in reliance on the choice-of-Tokyo-courts clause, as that clause would have been struck down by s 11. After 1 July 1998, it would no longer be futile to apply for a stay, as it is arguable (as I try to show in the main paper) that there is no longer anything in s 11 to preclude the court from considering the clause. If the stay were to be granted, the Australian receiver would have to institute new proceedings in Tokyo, but its substantive rights under the bill of lading would be the same as they were before 1 July 1998 - that is, those given by the Japanese version of the Hague-Visby Rules, interpreted according to Japanese law. As a result, there would be no reason for the court not to follow the procedure as amended on 1 July 1998, and to grant the stay by applying the forum clause rather than ignoring it.

(This example also helps to illustrate the point that in relation to procedural provisions, there is, strictly speaking, no retrospectivity at all in a case such as the present. In our example, the court would simply apply the procedure that applied at the date of the application for a stay. It would be immaterial that the substance of the claim was concerned with events before that date. This point was made by Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ in **Rodway v The Queen** (1990) 169 CLR 515 at 518, which is quoted in **Victrawl** (supra) at 615-6.)

Of course, it might be possible to argue that the claimant's substantive rights would be "affected" if it were forced to spend money on enforcing them in Japan rather than Australia. Such an argument seems unconvincing, however. It is the enforcement of the rights that would be affected, not the rights themselves. In **Vimar Seguros y Reasuguros SA v MV Sky Reefer** 115 S Ct 2322; 1995 AMC 1817 (1995), the Supreme Court of the United States considered an argument very similar in structure to the one we are presently considering. The court rejected the argument, holding that an arbitration clause in a bill of lading was not struck

down by Art 3, r 8 of the Hague Rules. In the course of his judgment for the court, Kennedy J quoted the following passage from the judgment of Scrutton LJ in **Maharani Woollen Mills Co v Anchor Line** (1927) 29 Ll L Rep 169:

"[T]he liability of the carrier appears to me to remain exactly the same under the clause. The only difference is a question of procedure - where shall the law be enforced? - and I do not read any clause as to procedure as lessening liability."

There is a positive side to the argument that s 11 (as amended), is a procedural provision according to the **Victrawl** test. If the Commonwealth were now to amend s 11 again to reverse the apparently unintended change wrought on 1 July 1998, that too would be a purely procedural amendment which would have the same "retrospective" effect as the 1 July 1998 amendments: that is, the newly-amended s 11 would apply to all stay applications brought before the court, no matter when the substantive claim arose. What an amended s 11 cannot do, of course, is to reverse the effect of any stay granted by a court in the period between 1 July 1998 and the date when any amending regulation is made.

1.2 Is Reg 6 valid at all? *ultra vires the regulation making power?*

It may be possible to argue that the **Carriage of Goods by Sea Regulations** 1998 (Cth) are invalid to the extent that they restrict the former operation of s 11 of the Act. The power to make regulations is conferred by s 7(2) of the Act (as amended in 1997), which provides that regulations may be made to add the Schedule of Modifications for five listed purposes, which are the elements of the reform package - extending the scope of operation of the rules, covering non-negotiable documents, and so on. Nothing in s 7(2) explicitly authorises the making of regulations to restrict the operation of s 11 of the Act. The only provision that could possibly authorise regulations to that effect is s 7(3), which provides:

"(3) the regulations may:

...

- (b) amend the provisions of this Part to the extent necessary or appropriate, having regard to the modifications set out in the Schedule of modifications in force from time to time."

Was it "necessary or appropriate" to amend s 11 in the way set out in my main paper in order to give effect to the reform package in the Schedule of Modifications? It is arguable that it was not. Nothing in the implementation of the reform package made it **necessary** to remove the jurisdictional protection formerly enjoyed by Australian cargo plaintiffs. Can it be regarded as "appropriate" to do so? The explanatory note following s 7(3)(b) reads as follows:

"Note: For example, regulations extending the range of sea carriage documents to be covered by the text in Schedule 1 may create a need for associated amendments of sections 10 and 11."

This note makes it fairly clear that the intention behind s 7(3)(b) was to make provision for an **extension** of ss 10 and 11, to correspond to the extended range of sea carriage documents covered by the amended Rules. It supports the view that the restriction of the scope of s 11 effected by reg 6 was unintended, but is it enough to show that the restriction was not "appropriate"? Can it be regarded as **inappropriate** to lessen the admittedly chauvinistic protection afforded to Australian plaintiffs by s 11 while engaged in the process of modernising the scheme of the Hague-Visby Rules? I am not so sure. (Although I am sure that that was not what was intended.) It certainly could not be said to be so without reference to the contextual material provided by the Working Group report and the Parliamentary debates. Even that material could only influence the question negatively, by showing that at no stage was it made explicit that there was an intention to restrict s 11.

If reg 6 of the **Carriage of Goods by Sea Regulations 1998 (Cth)** was **not** "necessary or appropriate" for the purpose of implementing the reform package, then it was not validly made. To put it another way, reg 6 would then be ultra vires the regulation-making powers conferred by the Act to the extent that it reduced the operation of s 11 of the Act. If that is so, then s 11 remains unamended by the events of 1 July 1998. Thus, it continues to strike down foreign forum clauses in bills of lading and similar documents of title, but not in other "sea carriage documents".

Whether reg 6 is valid or ultra vires, it is desirable, in my opinion, that it be further amended to make the position quite clear.