The Frank Stewart Dethridge Memorial Address 1998

HARMONISATION OF MARITIME LAWS AND THE IMPACT OF INTERNATIONAL LAW ON AUSTRALASIAN MARITIME LAW

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It is a privilege to speak in this series of Lectures dedicated to the memory of Frank Dethridge of Mallesons who played the leading role in founding the Maritime Law Association of Australia in 1974. Within a few years the Association was happily transformed into the Maritime Law Association of Australia and New Zealand. Were Frank Dethridge alive today I am sure that he would take great pride in the success and achievements of the Association.

It is a pleasure to follow in the line of distinguished lawyers who have preceded me as lecturers. They include Sir Ninian Stephen, Sir Harry Gibbs, Lord Mustill, Francis Reynolds and last, but certainly not least, Lord Cooke of Thorndon. Lord Cooke's subject, I am told, was "A Bill of Rights" which is, I suppose, rather different from a Bill of Lading. One of my pleasures in retirement is to sit with Lord Cooke on the Supreme Court of Fiji. We are both non-permanent Judges of the Hong Kong Court of Final Appeal but the architects of that court have so constructed it that we cannot sit at the same time.

Historically, in the area of maritime law, great emphasis has been placed on the desirability of securing uniformity of rules across the jurisdictions. Indeed, international conventions on matters of maritime law were among the earliest international conventions. That was because it was recognised early on that uniformity of rules facilitates international shipping and international trade. Inconsistent rules impede both international shipping and trade. Much the same comments apply to aviation law where great efforts have been made to ensure that, by

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means of international conventions, uniformity of international and national rules has been maintained.

Harmonisation of rules does not necessarily mean uniformity of rules. Harmonisation contemplates rules which can co-exist conveniently. Uniform rules answer that requirement. Rules which are different may also answer that requirement so long as they do not operate inconsistently or generate inconsistent outcomes. But in the context in which I speak today there is no need to draw a distinction between the two.

Harmonisation of rules can be achieved by various means. The most common method is by the drafting of an international treaty (convention) at a diplomatic conference, the convention then being open to accession by nation states, though accession may be subject to reservations or qualifications. The object of such a convention is to prescribe provisions for adoption by nation states. Another means of achieving harmonisation is by the formulation of a draft convention by an international organisation, though even then the draft may be put forward for adoption at a diplomatic conference.

The Hague Rules, which were first formulated at a meeting of the International Law Association in 1921 at The Hague, came into existence in this way. They were subsequently adopted at the Brussels Convention in 1924 and became the subject of the Carriage of Goods by Sea Act 1924 (UK) and similar statutes elsewhere, including Australia and New Zealand. The Hague Rules tempered the imbalance which had existed between ship owners on the one hand and cargo owners on the other, much to the detriment of the interests of the cargo owners.

The Brussels Protocol of 1968, incorporating the rules known as the Visby Rules, amended the Brussels Convention. These Rules resulted from the Conference of the Comité Maritime International. The proposals of that Conference were signed at Visby. The Convention and the Protocol are to be read as one instrument incorporating a single set of rules, the Hague-Visby Rules. Again, these Rules became the subject of Carriage of Goods by Sea Acts in a number of jurisdictions, including those already mentioned. In general, the amended Rules,

unlike the old Rules, did not require to be incorporated by clause paramount. The amended Rules expanded the area of operation of the old Rules. They also amended the provisions relating to the limits of liability, the limitation of actions and the evidentiary effect of a bill of lading in relation to a *bona fide* transferee.

Following the further Brussels Convention in 1979, the adoption of the relevant Rules in Australia and New Zealand has, however, not been uniform. In New Zealand, the Rules were adopted without alteration by the Maritime Transport Act 1994, Part XVI, and the Fifth Schedule to that Act. On the other hand, in Australia, where the Carriage of Goods by Sea Act 1997 and the new regulations incorporate the Rules, there have been significant departures from the international text.

The existence of these departures has the potential to generate difficulties. In due course, I shall refer to these departures and some of the problems which they may create. It will be convenient if I discuss now the impact of international law generally on our municipal law and the approach which has been taken by the courts to the incorporation of international law, more especially the provisions of international conventions, into municipal law.

THE IMPACT OF INTERNATIONAL LAW ON MUNICIPAL LAW

In some legal systems, such as the United States and a number of other countries, including European countries, a treaty which has been ratified by the executive government forms part of the law of the land. In other words, the provisions of the treaty form part of the domestic or municipal law of the jurisdiction. These legal systems subscribe to what is known as the monist theory, viewing international law and municipal law as a single body of law.

In most Common Law countries, however, and notably in Australia, New Zealand, the United Kingdom and Canada, the situation is different. The provisions of a treaty which has been ratified by the executive government do not form part of the law of the land unless

they have been so enacted by domestic legislation. In these jurisdictions the dualist theory prevails. According to this theory, international law and municipal law are two distinct systems.

This is not the occasion to discuss the differences between the two theories, except to say that, according to the dualist theory, the sources of international law and municipal law are different. The sources of international law consist of customary international law, binding resolutions of the United Nations Security Council, treaties (though there is some debate about this), and the general principles of law recognised by national courts. The sources of national law consist of statutes, regulations and judicial decisions.

Two approaches compete for acceptance in the Common Law world with reference to the importation of international law into municipal law. The first approach, known as "the incorporation approach", traces back to Blackstone.[1] It holds that customary international law forms part of the law of the land. The second approach, known as "the transformation approach", holds that national courts treat customary international law as a source of municipal law and, where it is considered appropriate, transform it into municipal law.

Notwithstanding the preference for the dualist theory, the weight of English authority appears to favour the incorporation approach.[2] Although the remarks of Lord Atkin in the Privy Council decision in *Chung-Chi Cheung* v *The King*[3] were somewhat ambiguous, they have been taken to favour the incorporation approach, so far as customary international law is not inconsistent with rules enacted by statutes or finally declared by the courts.[4]

In Australia, the position is not entirely clear. In *Chow Hung Ching* v *The King*[5] it seems that Starke J supported the incorporation approach,[6] while Dixon J favoured transformation, observing that international law

1 *Commentaries on the Laws of England*, vol 4, 55.
2 See Triggs "Customary International Law and Australian Law" in Ellinghaus, Bradbrook and Duggan (eds) *Emergence of Australian Law* (Butterworths, Sydney, 1989) 576.
3 [1939] AC 160.
4 *Ibid*, 167, 168.
5 (1948) 77 CLR 449.
6 *Ibid*, 470-471.

is not a part but one of the sources of English law.[7] Latham J seems also to have been of this view.[8]

Whatever may be the outcome of the competition between incorporation and transformation as applied to the reception into municipal law of customary international law, the reception of the provisions of an international convention is another question. Whether an international convention forms part of customary international law depends upon a number of factors, including the extent to which it commands international acceptance. Here a difficulty arises from the circumstance that the treaty making power is vested in the executive government,[9] yet the executive government has no power to make laws; it can only make subordinate laws with the authority of Parliament.[10] Accordingly, in Australia, "the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been incorporated into our municipal law by statute".[11] This proposition has also been accepted in England.[12]

What then is the status of a provision in an international convention which has been ratified by the executive government but not incorporated by legislation into municipal law? Can the judges resort to such a provision for the purpose of interpreting a statute or formulating common law rules? Kirby J would answer that question in the affirmative, subject to some qualification. His Honour has said:[13]

> If there is a gap in the common law, or if a statute is ambiguous, it is both inevitable and right that Australian courts, in today's world, should fill the gap, or resolve the ambiguity, by reference to *any* applicable international rule. Better that

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7 *Ibid*, 478.

8 *Ibid*, 462.

9 See LR Zines *The High Court and the Constitution* (4 ed, Butterworths, Sydney, 1997) 274-275.

10 *Simsek* v *McPhee* (1982) 148 CLR 636, 641-642; *JH Rayner (Mincing Lane) Ltd* v *Department of Trade & Industry* [1990] 2 AC 418, 476-477, 499-500.

11 *Minister for Immigration and Ethnic Affairs* v *Teoh* (1995) 183 CLR 273, 286-287.

12 *JH Rayner (Mincing Lane) Ltd, supra* n 10, 500; *Reg* v *Home Secretary; ex parte Brind* [1991] 1 AC 696, 747, 760.

13 Reported in I A Shearer "The Growing Impact of International Law on Australian Domestic Law" (1995) 69 ALJ 405 (emphasis added). See also Kirby "The Australian Use of International Human Rights Norms" (1993) 16 UNSWLJ 363, 365, 380.

> the judge should do this than rely upon personal, idiosyncratic values or upon distant analogies.

That view, in so far as it relates to the formulation of common law principles, has not been accepted in England. There it has been held that immigration officers, in exercising their powers and duties, cannot be expected to know or apply the European Convention on Human Rights and Fundamental Freedoms which has been ratified by the United Kingdom.[14] The Convention has not yet been incorporated into English law by legislation. The House of Lords in *Brind's Case*[15] has warned against recognising Convention obligations as a relevant element in the exercise of an administrative discretion because that would amount to introducing the provisions of the Convention by the back door.

In Australia and New Zealand, a less stringent approach has been adopted. In the controversial case of *Minister for Immigration and Ethnic Affairs* v *Teoh*,[16] a majority of the High Court of Australia held that a convention provision, in that case the Convention on the Rights of the Child, which had been ratified by Australia but not incorporated into Australian law, could generate a legitimate expectation that a decision-maker would act in accordance with the requirements of the Convention. Article 3 of the Convention provides that "[i]n all actions concerning children, ... the best interests of the child shall be a primary consideration".

Teoh was criticised on various grounds. One ground — a ground taken up by Senator Evans when he was Minister for Foreign Affairs and Trade — was the assertion that ratification is a statement to the international community but not to the Australian community. That is a remarkable distinction, to say the least of it. Another, less remarkable, ground, the one taken up in England, is that decision-makers should not be expected to be aware of conventions which Australia has ratified, and of the contents of such conventions. Australia has ratified

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14 R v *Chief Immigration Officer; Ex parte Bibi* [1976] 1 WLR 979, 985.
15 *Brind*, *supra* n 12, 748, 761-762.
16 *Supra* n 11.

over 900 treaties, though most of them would be of little or no concern to an administrative decision-maker.

In the event, both the Keating Government and the Howard Government introduced proposed legislation, the Administrative Decisions (Effect of International Instruments) Bills, the purpose of which was to provide that an unimplemented convention provision should not in itself generate a legitimate expectation. Each Bill met with resistance in the Senate and lapsed when an election was called. However, the Minister for Foreign Affairs and the Attorney-General in the two governments published joint statements declaring that a provision in a ratified but unincorporated convention is not to give rise to a legitimate expectation that the administrative decision-maker will apply the provision in making a decision. What effect the joint statements will have remains to be worked out. One thing is certain and that is that such statements cannot have a retrospective operation.

The principal controversy about *Teoh* concerns the legislation which was proposed and has lapsed but may be revived. That controversy leaves untouched the discussion in *Teoh* about the role of conventions as a source for the formulation of common law principles and in the interpretation of statutes. The majority accepted in *Teoh* that the provisions of a ratified but unincorporated convention are a legitimate source for judicial development of the common law, though they favoured a cautious approach to the development of the common law by these means. The majority stated that much will depend upon the nature and purpose of the particular convention provision, the degree of international acceptance which it commands and its relationship with existing principles of municipal law.[17] In *Teoh* itself, Gaudron J thought that the provisions of Art 3 of the Convention on the Rights of the Child simply reflected an existing principle of the common law.[18] The majority approach in *Teoh* was a more measured approach to development of the common law than that expressed by Kirby J in the passage which I have already quoted.

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17 *Ibid*, 288 *per* Mason CJ and Deane J.

18 *Ibid*, 305.

This statement in *Teoh* followed earlier statements by Brennan CJ in *Mabo* v *Queensland (No 2)*,[19] and by Mason CJ and McHugh J, and by Brennan J in *Dietrich* v *The Queen*,[20] in which reference was made to the role of international law and the relevance of convention provisions in the formulation of the common law. In New Zealand, a somewhat similar approach has been suggested. In *Tavita* v *Minister for Immigration*,[21] Cooke P indicated that New Zealand courts will give effect to the International Covenant on Civil and Political Rights.

The cases to which I have referred are all concerned with the use to which a convention ratified by the executive government but not implemented by legislation can be put. What use, if any, can be made of a convention not ratified by the executive government? In theory, provided that the convention commands wide-ranging international acceptance, there seems to be no strong reason why the courts could not resort to it for the purpose of developing legal principle. One would expect the judges to be very cautious about adopting that approach. Again much would depend upon the nature of the particular provision and its relationship with the existing common law as well as the extent to which the international community has accepted the convention.

The important point is that a municipal court faced with a shortfall in domestic legislation and common law rules applicable to the question in hand can theoretically draw upon an international convention for devising an appropriate rule to fit the case. To the judge adrift on a sea of uncertain values, the convention offers an identifiable landfall.

CONVENTIONS AND THE INTERPRETATION OF STATUTES

Fortunately there is a greater degree of uniformity in the use which is made of treaties in the interpretation of statutes than in the judicial development of common law principle. Although it is well established

19 (1992) 175 CLR 1, 42.
20 (1992) 177 CLR 392.
21 [1994] 2 NZLR 257, 266.

that, in the event of a conflict between national law and international law, a national court must give effect to national law, the principle of construction is that, where the language of the statute is capable of being interpreted so that it conforms to the nation's treaty obligations, it will be interpreted so as to conform to those obligations. The principle is based on the presumption that "Parliament, prima facie, intends to give effect to Australia's obligations under international law".[22] A statute will be capable of being so interpreted where its language is ambiguous or general[23] and the statute is enacted after, or in contemplation of, entry into or ratification of, the relevant international instrument.[24] The same principle has been applied in New Zealand[25] and in England,[26] though in New Zealand it applies *whether or not* the legislation was enacted for the purpose of implementing the relevant text,[27] an application with which I agree. What Deane J and I said on the question in *Teoh* is consistent with the New Zealand approach. Whether the present High Court of Australia will see the question that way remains to be seen.

Of course, not all conventions are expressed in terms that will throw light on the question of statutory interpretation which is under consideration. As Lord Denning said, some treaties are expressed in language "so wide as to be incapable of practical application" and, in such cases, "it is much better for us to stick to our own statutes and principles, and only look to the Convention for guidance in case of doubt".[28]

Indeed, as the High Court of Australia recently recognised in *Project Blue Sky* v *Australian Broadcasting Authority*,[29]

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22 *Teoh*, *supra* n 11, 287.

23 *Polites* v *Commonwealth* (1945) 70 CLR 60, 77.

24 *Teoh*, *supra* n 11.

25 *New Zealand Air Line Pilots Association Inc* v *Attorney-General* [1997] 3 NZLR 259, 289; *Rajan* v *Minister of Immigration* [1996] 3 NZLR 543, 551; *Wellington District Legal Services Committee* v *Tangiora* [1998] 1 NZLR 129, 137.

26 *Garland* v *British Rail Engineering Ltd* [1983] 2 AC 751.

27 *New Zealand Air Line Pilots Association*, *supra* n 25, 289; *Tangiora*, *supra* n 25, 551.

28 *Bibi*, *supra* n 14, 964.

29 (1998) 153 ALR 490, 517-518 *per* McHugh, Gummow, Kirby and Hayne JJ.

> many international conventions and agreements are expressed in indeterminate language as a result of compromises made between the contracting State parties. Often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed.

In such cases the convention leaves to the contracting State considerable leeway as to the means by which the identified goal is to be achieved. It is for the State to determine the means which are to be adopted. It may even be that conventions which are expressed in language that is less indeterminate leave a certain margin of appreciation to the contracting State as to the means by which the goal is to be achieved.

It remains for me to make specific reference to the interpretation of statutes which give effect to conventions. The question was discussed by the High Court of Australia in *Applicant A* v *Minister for Immigration and Ethnic Affairs*.[30] Section 4(1) of the Migration Act 1958 (Cth) provides that the word "refugee" has the same meaning it has in Art 1 of the Convention relating to the Status of Refugees as amended by the Protocol relating to the Status of Refugees. The Court held that the term should be construed in accordance with the principles of public international law rather than the principles of domestic law. A majority of the Court (Brennan CJ, Dawson and McHugh JJ) held that treaties are to be interpreted in the light of the requirements of the Vienna Convention on the Law of Treaties, in particular Arts 31 and 32 of that Convention. Some Justices appear to have equated those requirements as mandating an ordered yet holistic approach to the interpretation of a treaty, according to which primacy is to be accorded to the written text of the treaty, though the context, object and purpose of the treaty must also be considered.

The emphasis given to the primacy of the text of the treaty has been criticised[31] on the ground that the interpretation of treaties is a single combined operation in which each of the elements set out in Art 31 of the Vienna Convention are placed on the same footing. In *Applicant A*,

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30 (1997) 142 ALR 330.

31 See C Ward "*Applicant A* v *Minister for Immigration and Ethnic Affairs*: Principles of Interpretation Applicable to Legislation Adopting Treaties" (1998) 26 Federal LR 207.

McHugh J placed reliance on the dissenting judgment of Zekia J in the European Court of Human Rights in *Golder* v *United Kingdom*[32] to support the emphasis on the primacy of the text. The majority in *Golder* stated that:[33]

> In the way in which it is presented in the "general rule" in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.

In *Project Blue Sky* v *Australian Broadcasting Authority*,[34] where the joint judgment adopted a holistic approach to questions of statutory construction, it went on to say that "the process of construction must always begin by examining the context of the provision that is being construed".[35] The emphasis is on the context of the *provision*. That context is part of the context of the treaty as elaborated in Art 31(2) of the Vienna Convention. The insistence on the primacy of the text in a convention is no doubt a reference to the primacy of the text read as a whole, that is, to the text of a convention provision read in the context of its entire provisions.

For my part I doubt that the point on which the criticism of *Applicant A* hinges will prove to be of great significance. Debates of this kind rarely influence the outcome of particular cases. What is important for the purposes of Australasian maritime law is that statutes which give effect to international conventions should be interpreted in accordance with public international law principles, in particular Arts 31 and 32 of the Vienna Convention on the Law of Treaties.

For convenience I set out these Articles in full:

> Article 31

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32 (1975) 1 EHRR 524.
33 *Ibid*, par 30.
34 *Supra* n 29.
35 *Ibid*, 509 *per* McHugh, Gummow, Kirby and Hayne JJ.

(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
(2) The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes:
  (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
(3) There shall be taken into account, together with the context:
  (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  (c) any relevant rules of international law applicable in the relations between the parties.
(4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure;
(b) leads to a result which is manifestly absurd or unreasonable.

These provisions do not exclude from consideration the meaning which has been consistently assigned by a national court to words and expressions commonly used in the documentation by which international trade is transacted, when the convention uses those words and expressions. This proposition was applied by the High Court of Australia to the Hague Rules in *Shipping Corporation of India Ltd* v *Gamlen Chemical Co of A/Asia Pty Ltd.*[36] In that case Mason and Wilson JJ pointed out:[37]

[36] (1980) 147 CLR 142.
[37] *Ibid*, 159.

> There is a high degree of probability that when such words and expressions have been incorporated in a convention, they have been incorporated with knowledge of the meaning which has been given to them by national courts.

Public international law principles of interpretation, as well as the doctrine of comity are designed to achieve uniformity and harmonisation of maritime law across the jurisdictions. This is not the occasion to discuss the doctrine of comity except to say that there are interesting discussions in two New Zealand cases of the doctrine in its application to claims against a ship arrested in New Zealand when relevant orders have been made or proceedings are on foot in a foreign jurisdiction. The cases are *Fournier* v *The Ship "Margaret Z"*[38] and *Turners & Growers Exporters Ltd* v *The Ship "Cornelis Verolme"*.[39]

THE AUSTRALIAN DEPARTURE FROM THE HAGUE-VISBY RULES

The Carriage of Goods by Sea Amendment Act 1997 (Cth) marked a departure by Australia from the earlier tradition of adhering to the Hague Rules and the Hague-Visby Rules. To that extent the Act and the regulations under the Act made on 30 June 1998 represent an erosion of the uniform approach. The Act gives effect to a compromise reached between shippers, ship owners, insurers and other interests and it reflects the report of the maritime cargo liability working group. The Act defers the operation of the Hamburg Rules in accordance with a rather complicated procedure for review. In view of the limited support thus far manifested by other nations for the Hamburg Rules, it may well be that they will never come into operation under the Act.

The Act provides for a Schedule of Modifications to be added to the Act by regulations.[40] Schedule 1 contains the existing text of the Hague-Visby Rules, this being the English translation of Arts 1-10 of the Brussels Convention, as amended by Arts 1-5 of the Visby Protocol

38 [1997] 1 NZLR 629 (Salmon J).
39 [1997] 2 NZLR 119 (Williams J).
40 S 7(2).

and Art 11 of the SDR Protocol.[41] The Act provides that the regulations may modify the text in Schedule 1 for certain purposes.[42] Those purposes are:

(a) to provide for the coverage of a wider range of sea carriage documents (including documents in electronic form);
(b) to provide for the coverage of contracts for the carriage of goods by sea from places in countries outside Australia in situations where the contracts do not incorporate, or do not otherwise have effect subject to, relevant international conventions;
(c) to provide for increased coverage of deck cargo;
(d) to extend the period during which carriers may incur liability;
(e) to provide for carriers to be liable for loss due to delay in circumstances identified as being inexcusable.

Section 7(2) also provides that the text in Schedule 1 shall apply as if it were modified in accordance with the Schedule of Modifications. A "relevant international convention" is defined to mean the Brussels Convention, that Convention as amended by either or both of the Visby Protocol and the SDR Protocol or the Hamburg Convention.[43]

The Regulations bring about notional or deemed amendments of the Hague-Visby Rules in the following principal respects.

(1) The definition of "contract of carriage" in Art 1 has been replaced by a wider definition which includes non-negotiable bills of lading (consignment notes, sea waybills and ship's delivery orders) and negotiable sea carriage documents issued under a charterparty from the moment at which that document regulates the relations between its holder and the carrier.
(2) The Rules apply to a sea carriage document in electronic form even if the information is never reproduced in printed form.[44]

41 S 7(1).
42 S 7(2).
43 S 7(6).
44 Art 1A.

(3) The carriage of goods by sea to which the Rules apply covers an extended period during which a carrier is in charge of the goods according to para 2 (it should be para 3) of Art 1. That period begins when the goods are delivered to the carrier at the limits of a port or wharf and ceases when 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.

(4) The rules apply to deck cargo (other than live animals) subject, in the case of a shipper who has specific stowing requirements, to the shipper telling the carrier in writing of those requirements at or before the time of booking the cargo.[45]

(5) If the carrier carries goods on or above deck contrary to an express agreement with the shipper, then for any loss so resulting, the carrier is disentitled to any exception or exemption under the Rules.[46]

(6) A new Art 4A subjects the carrier to liability for loss, including economic loss, for delay unless the carrier can establish that (a) the delay was excusable; and (b) the carrier took all measures that were reasonably required to avoid the delay and its consequences. There is delay if the goods are not delivered within the time allowed by the contract or, if no time is so specified, within a reasonable time. A delay is excusable only if it falls within 8 categories mentioned in para 3 of Art 4A. The quantum of the carrier's liability for loss due to delay is limited.[47]

(7) A new Art 6A enables a shipper and a carrier to agree in writing that the Rules do not apply if the goods must be carried on deck and the character or condition of the goods reasonably justifies a special agreement regarding the carriage of the goods on deck. Containerised goods as defined are excluded.

(8) Amended Art 10 provides that the Rules shall apply to contracts for the carriage of goods from Australian ports to ports outside

45 Art 2.
46 Art 2.
47 Art 4A para 6.

Australia, subject to contrary agreement, and also from ports outside Australia to ports in Australia, again subject to contrary agreement, unless one of the three Conventions (or a modification of such a Convention by the law of a contracting State) applies.

(9) The Rules also apply to a contract for the carriage of goods by sea from a port in a State or Territory to a port in another State or Territory.[48]

(10) The Rules do not apply to carriage under a charterparty unless a sea carriage document is issued[49] and the Rules only apply to such a document if it is a negotiable sea carriage document and only while it regulates the relationship between the holder and the carrier of the goods.[50]

There can be little doubt that many of these extensions of the Hague-Visby Rules are improvements, moreover improvements which command the general acceptance of interested parties. In important respects they advance the protection of carriers and usefully extend to a wider range of contracts of carriage, including contracts in electronic form. Likewise, they usefully extend the duration of the carriage to cover the period when the goods are in the charge of the carrier within the limits of the port or wharf of embarkation until the goods leave the limits of the port or wharf of destination. The new regime governing deck cargo is an advance though questions of interpretation may arise.

The problem is, however, whether unilateral action amending the Hague-Visby Rules by one nation is a desirable development. Does the sacrifice of the advantages of uniformity and harmonisation bring benefits of greater value in the form of the amended provisions? Arriving at a balance is an extremely difficult task. The amendments necessarily introduce elements of uncertainty. One element of uncertainty is the interpretation of the new provisions. That element of uncertainty will work itself out and is not a matter of major concern.

48 Art 10 para 5.
49 Art 10 para 6.
50 Art 10 para 7.

The other element is more significant and that is the problem which will arise in a variety of situations of determining whether the Australian version of the Hague-Visby Rules will apply to a contract or whether the unamended Rules adopted in another jurisdiction will apply. Professor Martin Davies has identified some of these situations in his recent article[51] and in the paper which he has presented to this Conference. They raise another question: will the Australian version apply in many situations? I shall refer to these matters shortly.

As we have found on occasions within the Australian federation, uniformity brings very considerable benefits. But insistence on uniformity can be used by advantaged interest groups as a powerful argument for resisting desirable or necessary reform. There comes a point when, in order to achieve such reform, it may be necessary to throw off the shackles of uniformity in the expectation that the new developments will win more general acceptance, thus generating a new uniformity or harmonisation around those developments. It is to be hoped that this is what will happen as a result of the 1997 Australian Act and the 1998 regulations. Already other nations such as China and Vietnam are moving down a divergent path. If it does happen it will necessitate an international conference and the adoption of a convention. In saying this, I make the assumption that the Hamburg Rules will continue to be ignored by a large number of trading nations.

It is worth noting that in the 1950s Sir Leslie Scott was able to say:

> No document gives more scope for ingenuity in its interpretation than a statute which attempts to incorporate into English law the terms of an International Convention. A well-drafted enactment like the Sale of Goods Act, 1893, has the effect of crystallizing the law within a few decades; one such as the Carriage of Goods by Sea Act, 1924 puts it into confusion indefinitely. Now, nearly thirty years later, every month sees some new and insoluble problem arising under it.

Twenty years later, however, Mr Anthony Diamond QC observed:

> This was not the first time, nor of course the last, that a kind of bewildered fascination has bemused those who have the task of interpreting an international convention. Due to the series of trade-offs and compromises involved in

[51] "Australian Maritime Law Decisions 1997" [1998] LMCLQ 394, 395-396.

> producing a multilateral contract between opposing political and commercial interests, it is not surprising that clarity and consistency of purpose tend to be sacrificed at times for the sake of producing agreement. Today – after another 20 years of interpretation by the courts – the Hague Rules seem, with a few notable exceptions, to raise few problems of interpretation which have not been settled by the reported cases or which are not of greater academic than practical interest. But so far as one can still gauge the reactions of insurance managers and commercial lawyers in the mid-1950s it seems that The Hague Rules were welcomed as having ended the former internecine strife as between shipowners and cargo owners but that they were regarded as working only moderately well in practice due to defects in the structure of the Rules or in their drafting.

Mr Diamond went on to add:

> There was for a long time a general reluctance to undertake amendments to the Rules lest, once a diplomatic conference was called, the process might result in a general debate which could reopen the whole basis of the compromise reached in 1924. But another current of opinion was in favour of amending those parts of the Rules which were thought to be defective lest the defects, if unremedied, should undermine the use of the Rules as a whole and thus destroy even those provisions which had stood the test of time.

What is now happening is a repetition of a cycle which has occurred before.

That brings me to Professor Davies' discussion of the conflicts of law difficulties which the Australian initiative has generated. Australian courts will ordinarily apply Australian law to contracts of carriage of goods from Australia, especially contracts made in Australia. But, as Professor Davies notes, actions on such contracts are usually brought in the jurisdiction of intended destination. If the contract chooses Australian law or the 1997 Australian Act, the foreign court or tribunal would, in all probability, apply the modified Rules.

If, however, the contract incorporated the Hague-Visby Rules without specifying the Australian version, what would be the result? An Australian court would apply the Australian version of the Rules. But why should a New Zealand court adopt the same approach? On the other hand, in the case of a contract of sea carriage of goods into Australia, the ordinary Hague-Visby Rules will ordinarily apply. That is

because modified Rule 10 para 10 provides for this application of the ordinary Rules when one of the Conventions applies, by agreement or law, to the carriage. Most maritime nations have adopted one of the Conventions. And what of the situation where carriage begins in a jurisdiction which, like Australia, has adopted a combination of rules from more than one Convention so that its rules are also a variation of the Hague-Visby Rules?

It is significant, as Professor Davies has pointed out, that Thomas J in *Akai Pty Ltd* v *People's Insurance Co Ltd*[52] refused to give effect to the decision of the High Court of Australia in *Akai Pty Ltd* v *People's Insurance Co Ltd*.[53] That was because Thomas J refused to apply the Australian statutory provision which invalidated the provision choosing English law as the governing law, thereby leaving the contractual choice of law provision on foot.

Professor Davies has observed, rightly in my view, that similar questions can arise in connection with sea carriage of goods between Australian States owing to the absence of uniform State legislation based on a bill drafted by the Commonwealth. Some, but not all, States have enacted legislation based on this draft.

CONCLUSION

Lack of uniformity is a significant aspect of Australian maritime law. It is not confined to sea carriage of goods. It extends to Australia's approach to the *forum non conveniens* doctrine. Australia has rejected the *Spiliada*[54] principle in favour of the principle that a stay will be granted only if the local forum is a clearly inappropriate forum for the determination of the dispute.[55] New Zealand, on the other hand, subscribes to *Spiliada*,[56] with its insistence on what is the more

52 [1998] 1 Lloyd's Rep 90.
53 (1996) 188 CLR 418.
54 *Spiliada Maritime Corp* v *Cansulex Ltd* [1987] AC 197.
55 *Voth* v *Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.
56 See, for example, *Longbeach Holdings Ltd* v *Bhanabhai & Co Ltd* [1994] 2 NZLR 28; *Fournier* v *The Ship "Margaret Z"*, *supra* n 38.

appropriate forum. The difference between these tests is not great but it can produce different results.

In commercial and maritime matters, especially in the realm of international trade, certainty is of fundamental importance. Uniformity and harmonisation lead to certainty. Accordingly, they should not be lightly discarded. It is to be hoped, therefore, that a new convention governing sea carriage of goods can be adopted so that the "Balkanisation" of the Hague-Visby Rules is brought to an end by the adoption of a more appropriate régime.