Marine Insurance: Legal Sleeping Dogs

Michael Hill
Director,
Associated Marine Insurers

Michael A. Hill

In 1982 Michael Hill established Australia's leading marine insurance organisation, Associated Marine Insurers, and until recently was the company's Managing Director. He is now a non-executive director of the company.

Michael is a Fellow of the Chartered Insurance Institute with 47 years marine insurance, marketing and management experience. After serving on the Cargo and the Executive Committees of the International Union of Marine Insurance (IUMI) he is presently Chairman of the IUMU Nominating Committee. Michael is a frequent speaker at conferences in Australia and overseas and has been an adviser to the Australian Law Reform Commission several times including its Review of the Marine Insurance Act.

In the early 1990's his papers on Catastrophe Risks of Dry Bulk Cargo presented at IUMI Conferences in USA and Switzerland highlighted the appalling losses of vessels, crew and cargo especially on iron ore carriers from Western Australia. All the tables of loss statistics in the widely acclaimed Australian Government "Ships of Shame" report were taken from these two papers. The result of this publicity was no more cargo losses and no more crew deaths since 1992 on vessels sailing from Australian ports.

A persistent campaigner for the potential national advantage of importing less and exporting more marine insurance, Michael in 1984 launched and actively pursued a campaign to abolish stamp duty on marine insurance contracts in all states which succeeded in 1986/87.This has produced significant ongoing cost savings for Australian ship-owners and traders. It has also encouraged most of them to buy their marine insurance from Australian based suppliers.

Michael played a significant role in the enactment of the Australian Carriage of Goods by Sea Act 1991 through his active campaigning for Australia to adopt the 1968 Hague Visby Rules and SDR Protocol and to reject the flawed Hamburg Rules.

In 1995 Michael won the Governor of Victoria Export Award for individual achievement for his success in boosting Australia's marine insurance exports.

Marine Insurance – Legal Sleeping Dogs

A paper presented by Michael A. Hill, director, Associated Marine Insurers Agents Pty Ltd., at the Adelaide conference of the Maritime Law Association of Australia and New Zealand on 30 September 2004

Introduction

It is usually considered sound advice to let sleeping dogs lie and in a legal sense many laws are best left unchanged. Others may benefit from a review whilst some legal sleeping dogs definitely need to be awoken. This paper will identify laws impinging on the business of marine insurance in Australia and New Zealand and will consider arguments for either leaving them alone, giving them a gentle shake or, in some cases, a sharp kick in the ribs.

Looking Back over 25 years

Twenty-five years have elapsed since I first addressed this association at its 1979 conference in Wellington, New Zealand.[1] Much useful law reform has been achieved in Australia and New Zealand during this last quarter century. Let us have a look at the changes in this period to some of the laws that impact on marine insurance.

1. Carriage of Goods by Land

In Australia the only statute imposing liabilities on road carriers for loss of or damage to goods carried was removed by the Queensland Carriage of Goods by Land (Carrier's Liability) Repeal Act of 1993. In New Zealand the Carriage of Goods Act 1979 applies to the carriage of goods by road in New Zealand. It limits the carrier's liability to NZ $1,500 for each unit of goods lost or damaged.

2. Carriage of Goods by Sea

After much ill informed comment and acrimonious debate, the 1991 Carriage of Goods by Sea Act took Australia from the 1924 Hague Rules to the 1968 Hague Visby Rules and SDR Protocol. Similar reform occurred in New Zealand with the 1994 Maritime Transport Act.

3. Carriage of Goods by Air

Since 1979 both Australia and New Zealand have moved from limits based on gold francs, under the Hague Protocol to the Warsaw Convention, to limits based on special drawing rights under the Montreal Protocol.

---

1 The Implications for Marine Insurers of the Carriage of Goods by Sea in the 1980's presented at the September 1979 Conference.

4. **Limitation of Liability of Owners of Sea-going Ships**
In 1979 both Australia and New Zealand were still operating under the UK Merchant Shipping Acts of 1894 and 1900 with their very low liability limits. This was despite the 1957 International Convention having come into force overseas in 1968. Now, in Australia, the Limitation of Liability for Maritime Claims Act 1989 (as amended by the International Maritime Convention Legislation Amendment Act 2001) applies the massively higher liability limits of the 1996 Protocol to the 1976 Convention. Presently in New Zealand the original limits of the 1976 Convention continue to apply by Part 7 of the Maritime Transport Act 1994. Until New Zealand adopts the 1996 Protocol the liability limits in that country will remain considerably lower than those in Australia.

5. **Marine Insurance Law**
In 1998 Australia amended its 1909 Marine Insurance Act so as to exclude pleasure craft from its scope thus making their insurance subject to the 1984 Insurance Contracts Act. I am not aware of any changes in the period to the equivalent New Zealand act.

Laws Best Left Unchanged (The Sleeping Dogs)
Arguably the law which above others merits being left undisturbed is the law in Australia relating to the liability of road carriers for loss of or damage to commercial goods carried. In Australia it isn't unusual at all for bailees to be allowed to contract out of liability for the loss of or damage to the property under bailment. Many bailees, such as car park operators, do avail themselves of the opportunity to contract out of liability. However, in comparison with other countries, the Australian situation which allows freedom of contract for the overland transport of commercial goods may be regarded as unusual. It doesn't follow from this that it is wrong. On the contrary, the Australian position is one to be defended on the grounds of economic efficiency and therefore of national interest. The law in New Zealand is very different but this doesn't mean it is to be preferred.

The usual practice in Australia is for road carriers to offer their services on contract terms which purport to exclude any liability on their part for loss of or damage to goods carried. Most carriers of any size operate in this way. Some of them recommend shippers to effect goods in transit insurance and some carriers offer to arrange such insurance on an agency basis. In most cases shippers will find it cheaper to have their insurance broker organise tailor made cover through a highly competitive marine insurance market.

Each loss that occurs is paid only once but it may be handed more than once. This increases the total cost of the loss. The balance of risk between shipper and carrier needs to focus on efficiency more than on equity. Commercial shippers insure their shipments and carriers insure their potential liability for cargo loss or damage. In the end it all comes back to insurance.

On the face of it, if both the shipper and the carrier insure, there appears to be double insurance. But to the extent that a carrier is obliged to meet all or part of a loss, the claim on the cargo insurer is correspondingly reduced. Thus there isn't double insurance but there is double handling if a shipper (as usually happens) recovers first from his insurer leaving the insurer subrogated to his rights against the carrier and if the insurer pursues those rights. In Australia the subrogation right against the carrier is usually worthless due to the contract terms so the insurer doesn't pursue it. Thus the carrier avoids both the claim and its handling costs, keeping his overheads and his freight rates low.[2]

Australia has arguably one of the most efficient road transport operations in the world and the freedom of contract allowed by the law is part of that efficiency. Australia should continue to dare to be different. The lobbying of shipping companies on behalf of overseas container operators to have Australian road carriers held liable for cargo loss should be seen for what it is-self interest rather than national interest.

There are superficially attractive arguments for imposing liability on Australian road carriers but they don't stand up to objective analysis. The most compelling argument is that carriers need to have a potential liability so as to give them an incentive to care for the goods. In reality, and given the highly competitive trucking industry in Australia, the carriers already have a strong incentive to deliver the goods promptly and safely if they are to retain a clients business. All the shipper needs to do is to avail himself of competitively priced goods in transit insurance from one of the specialist insurers and to select a reputable carrier.

Looking at other sleeping dogs, the laws relating to the carriage of goods by air and to limitation of shipowner's liability are best left undisturbed except for New Zealand's need to follow Australia in adopting the 1996 Protocol to the 1976 Limitation Convention.

---

2 For an illustration of how handling costs of pursuing and defending cargo claims increase overall transport costs see "Shipowners Liability for Loss or Damage to Cargo-Economic Implications of Hague-Visby and Hamburg Rules" presented by Michael A. Hill at the Bern, Switzerland Conference of the International Union of Marine Insurance, September 1992.

Laws in Need of Reform

There are two laws which arguably could benefit from some reform. These are the marine insurance acts of both Australia and New Zealand and the laws of each country relating to the carriage of goods by sea.

Looking first at the Australian Marine Insurance Act of 1909, this has been comprehensively reviewed by the Australian Law Reform Commission and the recommendations of its 2001 report[3] still await the attention of the legislators.

The existing draconian impact of a breach of warrant has few supporters and there is widespread approval of the Commission's recommendation for the concept of warranties to be abolished and replaced by express terms, the breach of which will only entitle insurers to be relieved of liability where the breach is causative of the loss. This reform has already occurred in New Zealand as long ago as 1977[4] and the Australian marine insurance industry also advocates such reform.

On the other hand, there was widespread condemnation of the Commission's recommendation to abolish the requirement for the claimant to have had an insurable interest at the time of the loss. This was perceived as being contrary to the expressed desirability of having a regime consistent with international practice in the marine insurance industry and to be inconsistent with internationally adopted terms for the sale of goods.[5]

The recommendations to extend the scope of the Marine Insurance Act to risks on inland waters was welcomed but marine insurers will argue that the proposal to extend the act to apply to air risk incidental to a sea voyage doesn't go far enough and should apply for all cargo internationally transported by air whether or not in conjunction with a sea voyage.

Turning to the laws relating to a sea carriers liability for cargo loss, the existing law in both Australia and New Zealand works well enough in practice, is well understood and achieves a workable and reasonable balance of liability between the cargo owner backed by the marine cargo insurer on the one hand and the shipowner backed by the Protection and Indemnity Club on the other.

However, the perhaps utopian objective of international uniformity is presently further away than ever from being achieved. The UNCTAD sponsored Hamburg Rules of 1978 are now widely accepted as a failure and UNCITRAL is now working, with valuable input from CMI, on a replacement designed to achieve uniformity. The model looks likely to include removal of the nautical fault defence and anyone interested in this subject is urged to read or re-read my 1992 paper

---

3 Report 91 of the ALRC "Review of the Marine Insurance Act 1909" April 2001.

4 See Insurance Law Reform Act 1977 (NZ)

5 See "The Marine Insurance Act – One Reform Too Many" by Michael Hill 30 LQR

on the economic implications of the Hague-Visby and Hamburg Rules.[6] The removal of the nautical fault defence will result in a significant increase in the liability of shipowners for cargo loss without a commensurate reduction in the amount of the cargo losses themselves. UNCTAD's own studies[7] confirm this will increase freight rates to the detriment of the balance of payments of largely non-shipowning countries such as Australia. An option may be to reduce the liability limit per kilo for bulk cargos as the Hamburg Rules limit of US $3,500 per tonne is much higher than the value per tonne of all types of bulk cargo. A limit at this level may be acceptable for containers or breakbulk cargo but is too high for dry bulk cargo.

Arguably UNCITRAL and CMI are focussed on the legal and drafting challenges of this latest attempt at achieving international uniformity and not enough consideration is being given to the political and economic implications which were respectively the drivers and the destroyers of the Hamburg Rules project.

In conclusion, plenty of legal challenges lie ahead but let's not forget the old advice that if it ain't broke, don't fix it.

---

6 Ibid 2

7 "The Economic and Commercial Implications of the Entry Into Force of the Hamburg Rules and the Multimodal Transport Convention". UNCTAD Committee on Shipping. 1987 (TD/B/C.4/315 Part-One).