ALL AT SEA: CAN YOU CONTRACT OUT OF THE EXTENDED PERIOD OF RESPONSIBILITY UNDER THE AUSTRALIAN HAGUE-VISBY RULES?

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1. Introduction

Australia has traditionally embraced the adoption of international sea-cargo carriage conventions, first the Hague Rules in 1924, then the Hague-Visby Rules (HVRs) in 1991. Australia even attempted to adopt the Hamburg Rules,[1] though reception of the more recent Rotterdam Rules has been slower.

Prior to 1998, the HVRs applied under Australian law to what is commonly referred to as the "tackle-to-tackle" or "ship's rail-to-ship's rail" period. That is, the protections, rights and immunities provided for by the HVRs applied from the time that goods were loaded onto a ship to the time of their discharge from that ship.[2]

However, times and Conventions change. In the 1990s, Australia gave serious consideration to implementing an updated regime for the carriage of goods by sea, the Hamburg Rules. Indeed, the *Carriage of Goods by Sea Act 1991* (Cth) (COGSA) originally contained provisions which would have automatically brought the Hamburg Rules into force. Ultimately, Australia chose not to adopt the Hamburg Rules, largely because at the time they were due to take effect, none of Australia's major trading partners had adopted them. Instead, most national regimes for the carriage of goods by sea continued to be based on the Hague Rules and their variation, the HVRs.[3]

Rather than adopt the Hamburg Rules, Australia amended the HVRs in 1998 to create the hybrid and unique amended HVRs (AHVRs). These amendments deferred the automatic trigger that would have brought the Hamburg Rules into force and, as a compromise, sought to enact some of the perceived benefits of the Hamburg Rules, including the "extended period of responsibility".[4] Notionally, this extended the period during which the carrier has obligations for the safekeeping of cargo to be from "container yard to container yard" (CY to CY) rather than the traditional "ship's rail-to-ship's rail".

Article 7 of the unamended HVRs allows a shipper or carrier to enter into an agreement which limits liability during the period prior to the loading on, and subsequent to the discharge from the ship – that is, outside of the "rail-to-rail" period. This resonates in the context of the unamended HVRs, which apply from "rail-to-rail". Curiously however, Article 7 remains in the AHVRs today, having been left untouched by the 1998 amendments.

As a result of the retention of Article 7 in the AHVRs, shippers and carriers appear free to contract out of liability for the period outside of "rail-to-rail", notwithstanding the introduction of duties to care for cargo from CY to CY. That almost every contract for the carriage of goods by sea already contains an exclusion clause of the kind contemplated by Article 7 (that is, limiting the carrier's liability "rail-to-rail") has resulted in concerns that, by retaining Article 7, the reforms introducing the extended period of responsibility are of little or no effect.

This article explores the interpretive difficulties created by the retention of Article 7 alongside the extended period of responsibility, and examines three possible constructions of those provisions. Ultimately, the authors favour a construction which gives effect to both Article 7 and the extended period of responsibility and which is consistent with other facets of maritime law.

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[1] *United Nations Convention on the Carriage of Goods by Sea*, opened for signature 31 March 1978, 1695 UNTS 3 (entered into force 1 November 1992) (Hamburg Rules).

[2] This is still the position where the unamended HVRs or Hague Rules apply.

[3] See, eg, second reading speech to the *Carriage of Goods by Sea Amendment Bill 1997*: 'The Hamburg Rules are better for cargo owners than the existing Hague Rules, but only 22 countries have adopted them, most of them in Africa, covering only approximately one per cent of international trade' (Lindsay Tanner, 18 June 1997, 6163).

[4] See, eg, Explanatory Statement, Carriage of Goods by Sea Regulations 1998 (Cth): '[t]he industry-agreed compromise will maintain the Hague Rules basis of the COGSA… while broadening the protection the COGSA provides to Australian shippers, in some ways similarly to the intent of the Hamburg Rules'. Of the intended effect of the Hamburg Rules (should they have come into force), it was said in the second reading speech to the Carriage of Goods by Sea Bill 1991 (Cth) that '[w]ith the incorporation of the Hamburg Rules into this Bill, the shipper now has a smaller area of responsibility, the middle, grey area is slightly smaller and the carrier has a slightly larger area of responsibility' (Alasdair Webster, 17 October 1991, 2242).

2. The Australian Amendments to the HVRs and Interpretive Difficulties

2.1. The Australian Amendments

The HVRs and AHVRs are incorporated into Australian law by COGSA. The AHVRs apply to the carriage of goods on shipments (a) *out of* Australia (or between Australian States) and (b) shipments *into* Australia, so long as another Convention for the carriage of goods by sea (for example, the Hague Rules or unamended HVRs) does not apply.[5] Where the AHVRs apply, they apply mandatorily.[6]

In 1998, COGSA was amended to provide for, among other things, an extended period of responsibility for carriers. Pursuant to Article 1 Rule 3 of the AHVRs, the extended period of responsibility constitutes:

> '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 ends;
>
> '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'.[7]

The effect of this extended period is to apply the obligations in the AHVRs mandatorily and by force of law to any contract of carriage contained in a sea carriage document (ie, to the extent that the document relates to the carriage of goods by sea).[8]

Other provisions of the HVRs were not amended, including, notably, Article 7, which it appears was left *intentionally* untouched by the 1998 amendments. Article 7 provides that:

> Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connexion with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from the ship on which the goods are carried by sea.[9]

Article 7 applies expressly to a "carrier" and a "shipper". "Carrier" is defined generally to include the owner or charterer who enters into a contract of carriage 'with a shipper'.[10] "Shipper" is not a defined term, nor for that matter is "consignee" (though as a matter of general usage, a shipper is the person who arranges the carriage, and a consignee is the person entitled to delivery of the cargo).

2.2. Article 7 in the Context of the HVRs

Article 7 resonates in the context of the unamended HVRs. That is, where the period of responsibility for a carrier – being the period during which it has obligations to safekeep the cargo[11] – was determined by reference to, and began and ended with, the loading and unloading of the cargo from the ship, it made sense to allow carriers to limit their liability outside that period.[12] Carriers could therefore limit their liability during a period in which they might still have influence over the cargo (ie, in the port), but for which they did not have non-delegable duties to care for the cargo under the HVRs.[13]

The *travaux préparatoires* to the Hague Rules and HVRs exemplify this understanding. Discussing the fact that most sea carriage documents are directed towards ocean carriage – being the leg covered by the HVRs – as well

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[5] *Carriage of Goods by Sea Act 1991* (Cth) s 10 and sch 1A art 10.
[6] See *Carriage of Goods by Sea Act 1991* (Cth) s 11, which provides that '[a]ll parties to… a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia… are taken to have intended to contract according to the laws in force at the place of shipment' and that '[a]n agreement (whether made in Australia or elsewhere) has no effect so far as it purports to… preclude or limit the effect of subsection (1) in respect of a bill of lading or a document mentioned in that subsection'. See also art 3 r 8 which, where the rules apply, precludes the carrier from limiting its liability contrary to the rules.
[7] *Carriage of Goods by Sea Act 1991* (Cth) sch 1A art 1 r 3.
[8] If a liability arises where there is *no* contract of carriage then the rules for the carriage of goods by sea will not apply, and the parties are free to contract on their own terms: *Hines Exports Pty Ltd v Mediterranean Shipping Company* [2000] SADC 71, [13]-[14].
[9] *Carriage of Goods by Sea Act 1991* (Cth) sch 1A art 7 (emphasis added).
[10] *Carriage of Goods by Sea Act 1991* (Cth) sch 1A art 1 r 1.
[11] *Carriage of Goods by Sea Act 1991* (Cth) sch 1A art 3 r 2.
[12] See e.g. *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371, 386, discussing a clause in a bill of lading which purported to limit liability before loading and after discharge: 'This does not… lessen such liability otherwise than as provided in the Rules since the period of the carriage of goods for the purpose of the Rules ends when the goods are discharged from the ship'.
[13] Note that English law has diverged on this point, with the result that some duties arising under the HVRs can be delegated. See, eg, *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc* [2004] UKHL 49. The position remains unsettled in Australia, but there is authority favouring non-delegation, see, eg, *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* [2024] HCA 4,[63]-[64], citing *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371.

as carriage before and after ocean carriage, delegates at the 1921 Hague Conference of the International Law Association confirmed that:

> [w]e have a mixed contract. We want to make it perfectly clear that the same document, the same bit of paper, will serve two purposes. One covers a contract of carriage, the whole of which comes under this Code. Other clauses in that same bit of paper cover operations which are entirely outside the Code… [Article 7] is necessary for the safety of the rest of the document.[14]

2.3. Interpretive Difficulties in the context of the AHVRs

One of the central purposes of the AHVRs was to 'bring into the ambit of the Act some of the perceived benefits of the Hamburg Rules, thus benefitting shippers'.[15] In seeking to achieve this goal, the amendments therefore introduced some, but not all, of the measures in the Hamburg Rules. One of these measures was the extended period of responsibility, which is set out in Article 4 of the Hamburg Rules. Notably, there is no apparent equivalent to Article 7 of the HVRs or AHVRs in the Hamburg Rules. Rather, Article 23 of the Hamburg Rules renders void any contractual term 'to the extent that it derogates, directly or indirectly, from the provisions of [the Hamburg Rules]'.[16] As with Article 7 in the context of the HVRs, the inclusion of Article 23 in the Hamburg Rules is internally consistent. That is, any term which is inconsistent with the extended period will not apply and parties cannot 'contract out' of any period governed by the rules.

Conversely, the retention of Article 7 in the AHVRs gives rise to a number of difficulties. Article 7 seems to allow a carrier to limit its liability during the period before loading and after discharge, where it would otherwise have obligations of safekeeping under the extended period of responsibility.[17] As has been observed previously by numerous authors,[18] this would lead to the incomprehensible position that the extended period of responsibility would in practice almost never apply, being a result of the fact that most standard form contracts for the carriage of goods by sea already contain provisions purporting to limit the carrier's liability "rail-to-rail". As Davies and Dickey put it, the 'obvious intention' of the amendments 'that the terms of the sea-carriage document should only govern in unregulated fashion before or after [the] extended period' is 'undercut, perhaps fatally, by the fact that Art 7 of the Hague-Visby Rules was not amended'.[19] Likewise, the retention of Article 7 has been described as a 'terminal blow for the attempt to extend the carrier's period of responsibility', with the effect that the amendments are rendered 'lifeless'.[20]

Other views are available, however. It has also been put that '[o]ne of the effects of these changes [to the carrier's period of responsibility] is to render Article 7 more or less redundant', with the result that '[a]ny contract covering the periods before loading will be void under Art.3(8) if it is more favourable to the carrier than the new Rules'.[21]

Evidently, the merger of elements from two regimes for the carriage of goods by sea, each meant to apply in its own right, has led to uncertainty. It is true that the issue rarely arises in practice.[22] Yet cases can and do arise, such as under an indemnity where ocean carriage has been subcontracted, where the relationship between Article 7 and the extended period of responsibility is central to the allocation of liability. Absent judicial comment on the issue, the difficulties created by the retention of Article 7 alongside the extended period of responsibility remain to be authoritatively settled. In the meantime, how might we reach a workable construction of these provisions?

3. The Interpretation of International Agreements Incorporated into Domestic Law

Ultimately, it is 'the notional intention of the Parliament as revealed by the purpose of the words of the statutory provision and the context in which those words are used' with which a court is concerned in interpreting an

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[14] Comité Maritime International, *The Travaux préparatoires of the Hague Rules and of the Hague-Visby Rules*, 668–9.
[15] Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 15 of 1997-98, 26 August 1997).
[16] By contrast, Article 3 r 8 of the HVRs provides that '[a]ny clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect'. So, while the rules void any provisions tending to relieve the carrier of liability, that "voiding" is made subject to other rules of the Convention – which must of necessity include Article 7, which allows the lessening of liability in the circumstances it describes.
[17] Note that '[a]lthough the rules as a whole apply within the extended period of responsibility spelled out in Art 1, r 3, no provision states any particular duties of the carrier towards the goods before loading or after discharge': Martin Davies and Anthony Dickey, *Shipping Law* (*Thomson Reuters*, 5th ed, 2024), [12.1790]. That is, the amendments changed the period of application, but left the obligations the same.
[18] Kate Lewins, 'Are the 1998 Amendments to COGSA Holding Water' (2000) 28 *Australian Business Law Review* 422; Davies and Dickey (n 17) [12.1790].
[19] Davies and Dickey (n 17) [12.1790].
[20] Lewins (n 18) 424.
[21] 'COGSA 98', guide produced by Ebsworth & Ebsworth Solicitors 6.
[22] See Davies and Dickey (n 17) [12.200]–[12.230] for a comprehensive explanation of the reasons why 'the modified version of the Hague-Visby Rules… ha[ve] seldom been applied in Australian courts, and… will seldom be applied in the future'.

Australian statute.[23] However, when interpreting an international treaty which has been incorporated into domestic law, an Australian court takes a different approach. This was explained by the Full Federal Court in *FCS17 v Minister for Home Affairs*:

> Where a statute transposes the text of a treaty into the statute, 'the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty' and the rules as to international treaties are to be applied to the transposed text and 'the rules generally applicable to the interpretation of domestic statutes give way'.[24]

Likewise, in the context of the AHVRs, the High Court has clarified that:

> Although by s 8 of the COGSA the Australian Hague Rules… have the force of law in Australia, [they] 'form part of an international convention which must come under the consideration of foreign as well as' Australian courts. Accordingly, it is 'desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation'.[25]

The "rules as to international treaties" and "broad principles of general acceptation" include most pertinently the Vienna Convention on the Law of Treaties (1969), which requires international treaties to 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'.[26]

However, where Australia has made unilateral amendments to the text of an international Convention when incorporating it in domestic legislation, that must be taken into account. This was further explained in *FCS17*, where it was noted that a court will aim to give effect to the intention of Parliament where 'there is an expressly manifest intention to depart from the meaning attributed to the text of the Convention according to the application of principles for the interpretation of international treaties'.[27]

When interpreting the extended period of responsibility and Article 7, an Australian court must therefore take into account both (a) the uniquely Australian features of the AHVRs *and* (b) the internationally inspired features of the HVRs and Hamburg Rules. In line with these principles of interpretation, there are a number of ways a court could approach the reconciliation of Article 7 and the extended period of responsibility. These are explored below.

4. Construction 1 – A Freedom for Carriers and Shippers to Contract with Third Parties

The first construction proposes that Article 7 is limited in its application to a contract between a carrier *or* a shipper *and* a third party. That is, this construction places emphasis on the word "or" to propose that the freedom to limit liability granted by Article 7 is not for contracts between a shipper *and* a carrier, but is a freedom granted to shippers and carriers to limit their liability in relation to port activities conducted by third parties, such as stevedores and port operators. The inverse would also be true, Article 7 representing a freedom for third parties to limit their liability as against shippers and carriers.

Such a construction might be favoured to the extent that it gives effect to both the extended period and Article 7 within their respective spheres of operation. However, this construction has the difficulty of lacking any explicit support in the drafting history of the HVRs, even before the Australian amendments. It is also contrary to actual practice, where shippers and carriers frequently limit or exclude their liability against one another inasmuch as the applicable Convention allows.[28]

5. Construction 2 – An Extended Period for the Consignee

The second construction proceeds on the premise that *only the consignee*, as an "innocent" third party to the contract of carriage, is to benefit from the extended period of responsibility. On this view, only the shipper and

[23] *Palmanova Pty Ltd v Commonwealth of Australia* [2025] HCA 35, [75] ('*Palmanova*').
[24] [2020] FCAFC 68, [59] ('*FCS17*').
[25] *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* [2024] HCA 4, [29]-[30]. See also *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161, [70].
[26] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1).
[27] *FCS17* [61].
[28] See, eg, *New Holland Australia Pty Ltd v TTA Australia Pty Ltd (The Resolution Bay)* (Supreme Court of New South Wales, Carruthers J, 6 December 1994). There, the named shipper brought proceedings against the carrier. With reference to Article 7, the Court concluded that '[i]t was, of course, open to TTA (as the contractual carrier) to include an appropriate provision in the contract of carriage excluding or limiting its liability for loss of or damage to the goods prior to loading on the vessel'.

carrier are free to exclude or limit their liability outside of the "rail-to-rail" period in the way contemplated by Article 7.

An important feature of maritime law in Australia is that a consignee only becomes bound by the terms of a sea carriage document at the time of delivery of the cargo into their possession.[29] In this way, the consignee (or other third party to whom the bill has been endorsed) has very limited influence at the time of contracting, including as to the content of the terms agreed between the shipper and carrier. Indeed, the consignee will usually only become bound by the contract of carriage *after* goods have already passed from CY to CY. Against this background, and where the extended period was evidently a reform intended to benefit cargo interests, it would be surprising if the consignee was bound by an agreement between the shipper and carrier to exclude liability for the extended period.

As between the shipper and carrier, an essential and continuing feature of a bill of lading (or sea waybill) is that it is only prima facie evidence of the contract of carriage in the hands of those parties.[30] Consistent with this proposition, the second construction proposes that while the AHVRs mandatorily impose obligations of safekeeping on the carrier from CY to CY, so far as the shipper and carrier are concerned, those mandatory obligations are subject to Article 7, which directs attention back to the actual contract entered into *by those parties* – which may limit or exclude liability outside the "rail-to-rail" period. This position is also consistent with the wording of Article 7, which, as noted, applies expressly to a "carrier" and a "shipper".

In light of these considerations, this construction holds that the extended period of responsibility is the default or starting position (CY to CY), but, consistent with Article 7 and important features of maritime law, the carrier and shipper are free to amend this position via contract. The same freedom is not available as between the carrier and consignee, reflective of the consignee's limited role in the conclusion of the contract of carriage.[31] The practical implications of this construction are that carriers:

- cannot rely on their terms to exclude liability when a consignee claims for damage which occurred during the extended period of responsibility; and
- can rely on their terms to exclude liability when a shipper makes the same claim.

This construction also has the appeal of giving both Article 7 and the extended period of responsibility room to work within their respective spheres of operation. The interpretive imperative that a court should prefer such a construction when faced with two seemingly conflicting provisions in the same statute was mandated by the High Court in *Project Blue Sky*:

> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.[32]

An important twin principle to the above is that 'a statutory provision must strive to give meaning to every word of the provision… "such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent"'.[33] So, Article 7 must, where possible, be given some work to do in the context of the AHVRs, simply on the basis that it was left in the rules.

Reflective of these tenets of interpretation, this alternative construction gives the consignee (as an "innocent" third-party with limited influence on the contract of carriage) the greater protections seemingly offered by the

[29] See, eg, *Sea-Carriage Documents Act 1997* (NSW) and equivalent State Acts; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* (1978) 139 CLR 231, citing *Brandt v Liverpool* [1924] 1 KB 575. See also *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] FCAFC 202, [134] (Allsop J).

[30] It is a fundamental proposition at common law that a bill of lading is only *evidence* of the contract of carriage as between the shipper and carrier: *Sewell v Burdick* (1884) 10 App Cas 74, 105; *Hines Exports Pty Ltd v Mediterranean Shipping Co SA* [2001] SASC 311, [27]. The contract is made when the shipper arranges carriage and is later put into writing, the bill being only evidence of the contract earlier made. As such, extrinsic evidence may be adduced to show that the earlier contract differs from the terms of the bill.

[31] An interesting question *may* arise (but is not explored by the authors for the purposes of this paper) in respect of the proper interpretive technique to be employed in reaching this conclusion. Is it reached by interpretation in expounding (or choosing) the true meaning of the words used in Article 7 and Article 1 when they are read together (recall that Article 7, by its language, directs attention to the shipper and carrier, not the consignee)? Or is it reached by partially disapplying Article 7 to the consignee so as to avoid the total invalidity of Article 1 (ie, Article 7's effect is disapplied to specific facts or circumstances)? For more information on these interpretive techniques see Edelman J's discussion on interpretation, construction and partial disapplication in *Deripaska v Minister for Foreign Affairs* [2026] HCA 14, [140]-[151].

[32] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–2 [70]-[71] ('*Project Blue Sky*').

[33] Ibid 382 [71].

1998 amendments – and so gives effect to the extended period of Article 1. Importantly however, it also gives effect to Article 7 in permitting shippers and carriers to strike their own bargain for the period outside "rail-to-rail".[34]

While textually coherent, this alternative construction does not receive explicit support in the explanatory materials to the 1998 amendments, and there is no indication that Parliament intended to distinguish between the shipper and consignee in the application of the extended period. In fact, consignees receive no specific mention. Rather, it seems that the amendments were intended to provide greater protections for *all* cargo interests, inclusive of shippers and consignees, vis-à-vis carriers.[35] Ultimately, that this approach lacks explicit backing in the legislative materials may not be significant where the proposed construction aligns with the obvious intention of the amendments in benefitting cargo interests and operates in conformity with the broader scheme of maritime law.

6. Construction 3 – The Extended Period Prevails

As Edelman J recently queried in *Palmanova Pty Ltd v Commonwealth of Australia*, is it 'improbable that the framers of legislation could have intended to insert a provision which has virtually no practical effect'?[36] In other words, would Parliament have introduced the extended period of responsibility if they understood that the effect of Article 7 was to render it almost *automatically* inapplicable, reverting the position to exactly what it was under the unamended HVRs?

To the extent that Article 7 and the extended period of responsibility *are* irreconcilable, an argument could be mounted that Article 7 must be read as subject to, altered by, or impliedly repealed by, the amendments to Article 1 in introducing the extended period of responsibility. These interpretive techniques have support in a number of High Court authorities.[37]

In this respect, it is interesting that the Bills Digest for the Carriage of Goods by Sea Amendment Bill 1997 (Cth) sought to explain the extended period of responsibility by reference to Article 23 of the Hamburg Rules which, had it been enacted, would have prevented the carrier from lessening its liability in any way contrary to the Convention, including during the extended period of responsibility:

> The Bill allows… regulations to provide for… the extension of the period during which carriers remain liable for the cargo. *This seems consistent with article 23 of the Hamburg Rules*. Article 23 provides that any contractual term which derogates directly or indirectly from the obligations spelled out in the Convention is null and void…[38]

The reference to Article 23 of the Hamburg Rules in explaining the rationale behind the extended period of responsibility is telling. That is, the explanatory materials describe a consistency between the extended period of responsibility and the nullity of any contractual term which derogates from that period. That might well show an intention to subjugate Article 7 to Article 1.

As with each of the proposed constructions, this construction faces challenges – not least by knowledge of the fact that Article 7 was, seemingly knowingly, left in the AHVRs at the time of introducing the extended period of responsibility.[39] This leans against the total subjugation of Article 7 to Article 1.

7. Charting A Way Forward

The retention of Article 7 in the context of the AHVRs has led to uncertainty in the application of the extended period of responsibility. This article has proposed three possible constructions of those provisions. Firstly, that Article 7 applies only to contracts between shippers *or* carriers *and* third parties. Secondly, that the extended period of responsibility applies for the benefit of the consignee, reflecting their limited role in the conclusion of

[34] As noted, Article 3 r 8 of the HVRs voids any provisions tending to relieve the carrier of liability, but that 'voiding' is made subject to other rules of the Convention – which must of necessity include Article 7, which allows the lessening of liability in the circumstances it describes.

[35] The explanatory materials note that the amendments are 'a compromise solution in which carriers conceded significant extensions in the *protection offered to shippers*': Explanatory Statement, Carriage of Goods by Sea Regulations 1998 (Cth) (emphasis added).

[36] *Palmanova* (n 23) [74].

[37] See *Ross v The Queen* (1979) 141 CLR 432, 440; *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, 463; *Goodwin v Phillips* (1908) 7 CLR 1, 7, 10.

[38] Department of Parliamentary Services (n 15) (emphasis added).

[39] 'Article 7 allows the shipper and carrier to enter any agreement as to liability for loss or damage to the goods prior to loading and subsequent to discharge. *No change is being made to this Article'*: Explanatory Statement, Carriage of Goods by Sea Regulations 1998 (Cth) (emphasis added).

the contract of carriage. Finally, that Article 7 is subject to, or impliedly repealed by, the extension of the period of responsibility.

It appears to the authors that Article 7 must be given some work to do. Though the same must be said of Article 1 Rule 3, lest the extended period of responsibility be rendered almost entirely superfluous. As a result, the authors favour the approach outlined as construction two. Here, both the extended period of responsibility and Article 7 have a role. For it surely cannot be that the pre-1998 position remains the law; nor could it be, where Article 7 was left in the AHVRs, that *it* has no role.[40] That the default or starting position is CY to CY, but, consistent with Article 7, that the carrier and shipper (but not the consignee) are free to amend this position via contract also fits neatly with other facets of maritime law. This is so both insofar as the bill of lading (or other sea-carriage document) is only evidence of the contract of carriage between the shipper and carrier, and insofar as the bill only binds the "innocent" consignee to the contract of carriage at the time of delivery.

For now, an authoritative approach to the relationship between Article 1 and Article 7, and what this means for contracting out of the extended period of responsibility, remains all at sea.

[40] *Ut res magis valeat quam pereat*: 'it is better for a thing to have effect than to be made void'.