Adoption of the Hamburg Rules in Australia and New Zealand

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1. INTRODUCTION — THE BACKGROUND TO THE DEBATE

Marine cargo liability in Australia is now governed by the *Carriage of Goods by Sea Act* 1991 (Cth), (COGSA), Parts One and Two of which came into force on 31st October 1991. The effect of COGSA is that international and interstate carriage of goods by sea operate under:

(a) the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* done at Brussels on 25 August 1924 (the Hague Rules);
(b) the *Visby Protocol* amending the Hague Rules, done at Brussels on 23 February 1968; and
(c) the *SDR Protocol* amending the Hague Rules as amended by the Visby Protocol, done at Brussels on 21 December 1979;

where (a) (b) and (c) read together are referred to as the ***Amended Hague Rules.***

The amended Hague Rules are contained in Schedule 1 of COGSA and have force of law in Australia by virtue of section 8 of that Act. Section 8 is, however, subject to section 10, which states in effect that the amended Hague Rules only apply to contracts of carriage of goods by sea that:

(a) are made on or after 31 October 1991, and before 31 October 1994 (See below);
(b) are contracts of the type referred to in Article 10 of the amended Hague Rules; or
(c) are contracts of inter-state carriage[1] evidenced by a bill of lading or similar document of title; or

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1 Intrastate carriage of goods by sea is not covered by COGSA - s10(2).

(d) are contracts not covered by a bill of lading or similar document of title, but which contain an express provision that they are to be governed by the amended Hague Rules.

As to (a), COSGA Parts 1 and 2 have applied since 31 October 1991 — section 2(1). Any contract of carriage of goods by sea made before that date continues to be governed by the Sea-Carriage of Goods Act 1924 (Cth) (SCOGA) — COGSA Section 20 (2). For the purposes of contracts made on or after 31 October 1991, SCOGA is repealed — COGSA Section 20 (1). Part 3 of COGSA is not yet in operation.

Part 3 and Schedule 2 COGSA contain the Sections applying the Hamburg Rules[2] respectively. Section 2 (2) COGSA sets the date of commencement of the Hamburg Rules as a day to be fixed by Proclamation, being a day not sooner than the date that Australia accedes to the Convention.

If no such Proclamation is made within 3 years from the day of assent i.e. by 31 October 1994, Part 3 and Schedule 2 are to come into force automatically — Section 2(3) COGSA. This is so unless:

(i) Part 3 and Schedule 2 are repealed; or
(ii) Part 3 and Schedule 2 are to be reconsidered after a further period of 3 years from the date of passage through the second of the Houses of Parliament which passes the relevant resolution (s2(5)).

Moreover, a Proclamation under s2(2) cannot be made unless the Minister for Transport has consulted with, and given due consideration to the views of the various interested parties — s2(6).

This means that either there will be:

(i) a Proclamation of commencement for Part 3 and Schedule 2, or
(ii) no proclamation, but commencement anyway on 31 October 1994, or
(iii) repeal of Part 3 and Schedule 2 or
(iv) reconsideration until at least late 1997.

Which of these outcomes is most likely? The Hamburg Rules will be an operable International Convention from 1 November 1992 since there are now the required twenty accessions to it.[3] The Federal Department of Transport and Communications will be carrying out a lengthy review of the cargo liability regime both of Australia and of Australia's major trading partners during 1993.

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2 *United Nations Convention on the Carriage of Goods by Sea*, being Annex 1 of the Final Act of the United Nations Conference on the Carriage of Goods by Seas done at Hamburg on 31 March 1978. In transposing the rules into this Act, some minor textual changes were made. There is some argument as to whether these are merely stylistic or have a substantive effect. See Davies M, Carriage of Goods by Sea (1991) A.B.L.R. 57.

3 Barbados, Botswana, Burkina Faso, Chile, Egypt, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Tunisia, Uganda, Tanzania, Zambia.

The purpose of this review is to assist the Minister and ultimately the Parliament in making the decision on proclamation, repeal or deferral.[4]

Australia's major trading partners are as follows:[5]

1991–92 DECEMBER QUARTER	EXPORTS (%)	IMPORTS (%)
Japan	28.4	18.3
USA	9.6	23.4
Republic of Korea	6.1	2.4
New Zealand	5.5	4.7
Singapore	5.2	2.7
Taiwan	4.5	4.1
U.K.	3.0	5.5
Germany	2.1	5.8
Other Countries	35.6	33.1

Obviously Japan and the USA are vital trading partners. However, 'other countries' still account for about one-third of our trade. When considering country groupings, developing countries (DC's) accounted for 37.2% of our exports and 25.6% of our imports[6] in the quarter ending December 1991.

All the current accessions to the Hamburg Rules are by DC's,[7] 70% of which are in Africa. But whilst our major trading partners, particularly Japan, show no inclination to accede to the Hamburg Rules, should Australia do so?

When considering this question, the value of our sea cargo may be of importance:

	1990-91 ($m)	
Total exports	52 520	
Total outward sea cargo	42 995[8]	80% of exports carried by sea
Total imports	48 912	
Total inward sea cargo	35116[9]	70% of imports carried by sea

It is clear that Australia has an enormous reliance on sea carriage. This is particularly so for our exports, on which we rely for our economic well-being. However, Australia is not, and never has been, a major ship-owning country. Australia is a cargo-owning country — a *shipper* more than it is a carrier. In that respect, it may be argued to be squarely in the camp of the DC's.

4 See the requirements in s.2(6) COGSA of consultation and consideration of industry views.
5 Australian Bureau of Statistics: Foreign Trade Australia Merchandise Exports and Imports by country, December quarter 1991, issued 23 March 1992, at p.2
6 These percentages have been growing by 1.2% per year.
7 As classified by ABS statistics. Ibid at p.49-50.
8 *Australian Bureau of Statistics, Shipping and Air Cargo Commodity Statistics Australia June Quarter 1991* issued 21 April 1992, at p.5.
9 *Australian Bureau of Statistics, Shipping and Air Cargo Commodity Statistics Australia June Quarter 1991* issued 21 April 1992, at p.5

Our major trading partners, Japan, the USA, Korea, Singapore, the EC, while being large exporters and importers, are also ship-owning countries. These are the carriers we rely on to keep our Balance of Trade healthy. So where do Australia's best interests lie? To those who see the Hamburg Rules as a major advance in shipper's rights, the answer must seem obvious. But is this really a true view of the Hamburg Rules? This paper will compare and contrast some major aspects of the two conventions and attempt to arrive at a balanced view on a matter which is of vital importance to Australia's future economic prospects.

2. HAGUE OR HAMBURG — WHICH RULES?

2.1 *Cargo* v *Carrier* — is it war?

2.1.1 Absolute Liability

Until the nineteenth century, the general maritime law was that carriers were absolutely liable for damage or delay to cargo carried under contracts evidenced by bills of lading. The exceptions available were for loss or damage caused by act of God, acts of the Queen's (or public) enemies, inherent vice of the goods, the fault of the shipper, or a general average sacrifice.[10]

2.1.2 Change in the Nineteenth Century

Sea carriage of goods increased enormously during the nineteenth century, a reflection of the growth of commerce and international trade generally. Because carriage by sea was based on contract, carriers began to exercise their freedom to contract by inserting in bills of lading various exculpatory clauses to alleviate their position as virtual insurers of the cargo.[11] These exemption clauses, enshrined in standard form contracts imposed by ship-owners on cargo-owners, eventually achieved almost complete immunity for cargo loss however it was caused.[12] As between carrier and cargo-owner, economic war had broken out.

2.1.3 The US Position

The insertion of widely-drawn exemption clauses in bills of lading was not as acceptable in US jurisprudence as in English jurisprudence, certainly not in the latter part of the nineteenth century.[13] This was particularly so in

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10 See Astle W. E. *Bills of Lading Law* (1982) Fairplay Publications, London; Kimball J. D. *Ship Owners Liability and the Proposed Revision of the Hague Rules* (1975) J. Mar. L & Comm. 217; O'Hare C. W. *Shipping Documentation for the Carriage of Goods and the Hamburg Rules* (1978) 52 A.L.J. 415.

11 A principle already well-recognised in English jurisprudence. English Law principles dominated this area of maritime law because of the power of the British Merchant fleet.

12 Colinvaux, R., *Carver's Carriage by Sea* vol 1, 13th edition (1982) Stevens & Sons, London.

13 On absolute liability see *New Jersey Steam Navigation Co.* v *Merchants Bank of Boston* 47 U.S. (6) How 334 (1843), *The Propeller Niagara* v *Cordes* 62 U.S. (21 How) 7 (1858) especially at

relation to exemption for unseaworthiness, bad stowage and negligence.[14] On public policy grounds, the US Congress felt compelled to enforce a truce between carrier and cargo interests by legislation.

2.1.4 The Harter Act of the United States 1893

The Harter Act of 1893 was designed to prevent the abuses brought about by the English concept of absolute freedom to contract. Section 1 of the Act made it unlawful for a shipowner or his manager, agent or master to insert in any bill of lading a clause exempting him or them, from liability for loss or damage to cargo caused by negligence, fault or failure in proper loading, stowage, custody, care or proper delivery.[15]

Section 2 dealt with the unlawfulness of clauses reducing or avoiding the owner's obligation, or that of his master, manager or agent, to exercise due diligence to make the vessel seaworthy, and to properly man, equip, provision and outfit the vessel.[16]

The Harter Act was effective:

(i) whether the ship was under United States ownership or not;
(ii) whether the ship was carrying goods to or from ports in the United States;
(iii) from the time cargo left the ship's tackle until 'proper delivery';[17]
(iv) whether or not there is a causal connection between unseaworthiness and damage to cargo.[18]

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23. On the liability for fault despite exemption clause, see *Clark* v *Barnwell* 53 U.S. (12 How) 272 (1851) at 279-280, *Liverpool and Great Western S.S. Co.* v *Phenix Ins. Co.* 129 U.S. 397 (1889), *Hart* v *Penn R.R. Co.* 112 U.S. 331 (1884).

14 *The Willdomino* 272 U.S. 718 (1927).

15 Section 1 provides: It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

16 Section 2 provides: It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel, to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

17 Therefore, the Harter Act is still effective despite the US COGSA 1936 because COGSA in the US is a version of the unamended Hague Rules which deal with cargo tackle to tackle, on which see 2.2.3 below.

18 Connection is required by COGSA 1936. See Astle, op. cit. at 7-9.

2.1.5The Harter Act inspirational

Legislation modelled on the Harter Act was subsequently introduced in Australia, New Zealand and Canada.[19] The reason for the inspirational effect is obvious when consideration is given to the huge cargo owning interests in the former colonies. It was not to be expected however that these legislative interferences would meet with approbation in the traditional ship-owning countries of Europe, despite the retention in the legislation of the traditional common law maritime defences.[20]

2.1.6 The Hague Conference 1921

The Comité Maritime International (CMI), formed in 1897,[21] intervened in the economic warfare between cargo and carrier after the First World War had inflicted real and substantial damage on the merchant fleet. At a conference at the Hague in 1921, a set of rules[22] based on the Harter Act and related legislation was circulated and adopted. These rules were for voluntary inclusion in bills of lading.

2.1.7 The Voluntary Rules became Mandatory

By 1924 there was widespread agreement that an international convention on cargo liability was a desirable goal. A diplomatic conference was held at Brussels in that year at which the voluntary rules developed in 1921 were adopted as the International Convention for the Unification of Certain Rules relating to Bills of Lading 1924, called the Hague Rules.[23]

2.1.8 The Hague Rules adopted

It would seem then that cargo interests had succeeded in winning a battle in the war against carriers. Shots had been fired across the bows and ship-owners had to give in to cargo interests or suffer damage in the courts.

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19 *Carriage of Goods Act* 1904 (Cth); *Shipping and Seamen Act* 1903, 1908, 1911, 1912 (NZ); *Water - Carriage of Goods Act* 1910 (Can.)

20 Section 3 of the Harter Act provides that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agents, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

21 The Comité grew out of the International Law Association as a specialist grouping for maritime law.

22 Passed on September 3, 1921.

23 Signed at Brussels on August 25, 1924.

But was this really the effect of the Hague Rules' adoption?[24] *The Carriage of Goods by Sea Act* 1924 (UK) came into force on 1 January 1925. So too did the *Sea-carriage of Goods Act* 1924 (Cth), to be followed later by the Carriage of Goods by Sea Act 1936 (46 U.S.C. 1300-1313) *Water Carriage of Goods Act* 1936 (Can), and the *Sea-Carriage of Goods Act* 1940 (NZ).[25]

These were relatively rapid responses to the convention, eventually to be followed by most of the world's maritime nations. The Rules were tested quite frequently in the courts resulting in a body of decisions being developed which made the application of the Rules clearer. However, there was still dissatisfaction with many aspects of the rules. The areas of dissatisfaction were:

(i) the limits for carrier's liability in respect of:
- unit limitation being based on boxes, bales or bags when shipping was now becoming largely containerised
- the monetary value of the unit limitation being expressed in an outmoded manner

(ii) time limitations for the bringing of actions against carriers being inadequate
(iii) the application of agency principles in shipping situations being unsettled.[26]

2.1.9 The Hague Rules Amended

The problems widely recognised in the Hague Rules were discussed at a meeting of the CMI at Visby in Sweden. There followed a conference at Stockholm in 1963 where the 'Visby Rules' were circulated and discussed. This resulted in the Brussels Protocol to the Hague Rules signed in 1968.[27] The required number of ratifications were received in 1977 when the Brussels Protocol entered into force. However, few of Australia's major trading partners have adopted The Visby Rules.[28]

The amendments brought about by the Brussels Protocol are to:

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24 The Convention did not actually come into force until 1931, when the required number of ratifications were achieved. For a survey of this material see Sweeney, J. C., *The UNCITRAL Draft Convention on Carriage of Goods by Sea* Part 1 (1975) J Mar. L & Comm. 69-125 at 69-74.

25 This domestic legislation contained differing versions of the eventual text of the Hague Rules. The New Zealand Act of 1940 superseded the *Carriage of Goods by Sea Act* 1922 (NZ).

26 *Riverstone Meat Co. Pty Ltd* v *Lancashire Shipping Co. Ltd (The Muncaster Castle)* [1961] AC 807; *Adler* v *Dickson (The Himalaya)* [1955] 1 QB 158.

27 Signed on February 23, 1968.

28 *Carriage of Goods by Sea Act* 1971 (UK) incorporated the Visby amendments and was proclaimed in 1977. The US and Korea have not yet applied them. Japan has legislation currently progressing through its parliament for implementation of the amended Hague Rules. Australia now applies them under the *Carriage of Goods by Sea Act* 1991 (Cth). Apart from the UK, Germany, France and Italy, EC countries are showing reluctance to apply anything but the unamended Hague Rules.

(i) Article 3 paragraph 4 protecting the rights of third parties on receipt of a bill of lading.
(ii) Article 3 paragraph 6 on time limitations, extending the period in which to bring an action to 12 months, or longer in some cases.
(iii) Article 4 paragraph 5 on the monetary limitations per package or unit. The maximum liability is 10000 francs per unit or 30 francs per kilo.[29]
(iv) Article 4 bis, a new article, extending the defences and limits to liability to servants or agents of the carrier,[30] whether the action is brought in contract or not.
(v) Article 9, a complete replacement, dealing with liability for nuclear damage.
(vi) Article 10, dealing with the application of the Hague Rules to contracting States.[31]

2.1.10 The Hague Rules Amended Again

The Hague-Visby Rules, as they are known in their amended form, were amended again by the SDR Protocol.[32] The SDR Protocol amends Article 4 paragraph 5, discarding the reference to francs, and substituting a valuation limitation on liability of 666.67 units of account per package or 2 units of account per kilogram, whichever is the higher. The unit of account referred to, the Special Drawing Right (SDR) of the International Monetary Fund, was chosen to try to overcome the severe problems of unit valuation under the original Hague Rules.

Originally, Article 4 paragraph 5 referred to one hundred pounds per package or unit. This was interpreted in Australian terms to mean £A100, or later $A200.[33] The original Article 9 of the Hague Rules provided that the monetary units in the rules were to be taken to be gold value.[34]

If the original Article 9 evinced a sufficient contrary intention, the limitation amount would have been 100 pounds *gold value* expressed in Australian dollar terms, a significantly larger value for a maximum limitation amount. But did original Article 9 evince such an intention?[35]

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29 The franc is defined in gold terms to consist of 65.5mg of gold of millesimal fineness 900. This was known as the Poincaré franc.
30 Thus to some extent dealing with the 'Himalaya' problem. *The Muncaster Castle* decision was not dealt with by the Protocol, however. See 2.2.10 below.
31 Application will be further dealt with at 2.2.1 - 2.2.4 below.
32 Signed at Brussels on December 21, 1979.
33 Because of the effect of sections 8(4) and 10(1)(a) of the Currency Act 1965 (Cth) providing that all references to pounds in Commonwealth Acts are to be construed as $A2, unless the contrary intention appears. See Davies, M., *What Price a Gold Sovereign? Limitation of Liability under the Hague Rules* (1990) 6 Aust. Bar Rev. 49 at 50.
34 Article 9 was completely replaced in the Visby amendments.
35 See Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co. [1989] 1 Lloyds Reps 518, a decision taking the 'gold value' viewpoint, thus giving a value of $13,885.74 per package or unit. The Hague Rules were applied in this case by agreement of the parties, and not under the former Sea-Carriage of Goods Act 1924 (Cth).

The outcome is uncertain, and now redundant, since Australia has adopted the SDR Protocol. However, the SDR value fluctuates also. The current SDR value is $0.52131 giving amended Hague Rule limits on liability of $347.54 per package or $1.04 per kilogram. The problems of per package or unit limitations are dealt with below.[36]

2.1.11 The Hamburg Rules Emerge from the Fog

From the above discussion, the history of carriage by sea can be seen in brief as follows:[37]

(i) Common carriers of goods by sea were originally insurers of their cargoes;
(ii) The only exceptions to this absolute liability were acts of God, Act of the Queen's enemies,[38] inherent vice of the goods, fault of the shipper, or a general average sacrifice;
(iii) However, carriers also enjoyed freedom to contract. This resulted in widely drawn exemption clauses;
(iv) Cargo interests were at first powerless against standard form contracts with wide exclusions;
(v) The US Congress intervened on behalf of beleaguered cargo interests with the Harter Act 1893;
(vi) Eventually, the Hague Rules were framed, based on the Harter Act and similar legislation, and widely adopted;
(vii) The Hague Rules were twice amended to reflect changes in shipping practice, and exchange rate movements.

This all seems eminently satisfactory as wars go. Cargo wins, carriers win, cargo wins again, carriers strike back, then a truce is negotiated. Supporters of the Hague Rules see them as embodying:

(i) an acceptable distribution of commercial risks
(ii) an acceptable sharing of legal responsibilities
(iii) a reasonable balance between cargo owners and carriers
(iv) pragmatism and simplicity
(v) certainty, both in relation to the meaning and scope of the Rules themselves and to the implications for marine insurance.

However, supporters of the need for change see the Hague Rules as surrounded by a fog of *uncertainty* — uncertainty as to:

(i) application
    • documentation

36 As at June 15, 1992.
37 See **Kindred, H. M.**, *From Hague to Hamburg: International Regulation of Carriage of Goods by Sea* (1984) 7 Dalhousie LJ 585; Astle, op. cit. and Sweeney, op. cit. See also Ivamy, *Payne and Ivamy's Carriage of Goods by Sea* 13th ed. (1989) Butterworths, London at 153-160.
38 See Colinvaux, op. cit. at para. 14. These do not include pirates, robbers or traitors. These are referred to as public enemies in US law.

- geographic coverage
- period of carriers responsibility for cargo
- deck cargo
- live animals

(ii) the effect of exemption clauses, particularly those peculiar to sea carriage
(iii) the unit limitation of liability
(iv) jurisdiction and choice of forum
(v) the effect of arbitration clauses
(vi) the position of non-contractual claims and third parties
(vii) general interpretation of vague or illusory terms.

As a result of dissatisfaction with the Hague Rules, especially by developing countries, a new convention on the Carriage of Goods by Sea was developed over many years by UNCITRAL.[39] The culmination of this development was in March 1978 when the convention was adopted at Hamburg in Germany. The new Convention is thus known as the Hamburg Rules.

The Hamburg Rules are to come into force on the first day of the month following the expiration of one year from the date of deposit of the twentieth instrument of ratification, acceptance, approval, or accession. The twentieth such instrument was deposited by Zambia on 7 October 1991. The Hamburg Rules will thus come into force on 1 November 1992.

But do these new Rules clear away the fog, or merely blend back into it?

2.2 The Hague[40] and Hamburg Rules Compared.

2.2.1 Application of the Rules — documentation requirements:

The amended Hague Rules apply to every bill of lading[41] relating to the carriage of goods between ports in two different states if:

(a) the bill of lading is issued in a Contracting State or
(b) the carriage is from a port in a Contracting State or
(c) the contract contained in or evidenced by the bill of lading provides that the rules of the Convention or legislation of any state giving effect to them are to govern the contract,

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39 The United Nations Commission on International Trade Law. The process began in 1964 at a meeting of the United Nations Conference on Trade and Development, UNCTAD, in Geneva. A later meeting of UNCTAD, transferred the responsibility for the new Convention to UNCITRAL in 1971. Between 1971 and 1975 the Draft Convetnion was drawn up at a series of sic meetings. For a survey of these proceedings see Sweeney, J. C., The *UNCITRAL Draft Convention on Carriage of Goods by Sea Parts* (1–5 in (1975–76) 7 J. Mar. L. & Comm. 69–125, 327–350, 487–503, 615–670 and (1977) 8 J. Mar. L. & Ccomm. 167–194.

40 The Amended Hague Rules will be the basis of the comparison since the Carriage of Goods by Sea Act 1991 (Cth) has adopted these Rules.

41 The bill of lading is a document unilaterally issued by or on behalf of the Master of a ship after the cargo has been loaded on board and the ship put to sea. See *Heskell* v *Continental Express Ltd* [1950] 1 All ER 1033, at 1037.

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person (Article 10).

Section 10 (1) (b) of COGSA states that the amended Hague Rules only apply to a contract of carriage of goods by sea that is a contract

(i) of the kind referred to in Article 10, or
(ii) of inter-State carriage contained in or evidenced by a bill of lading or similar document of title, or
(iii) contained in a non-negotiable document (other than a bill of lading etc) that expressly provides that the amended Hague Rules are to govern the contract.

Therefore, all contracts are covered (Article 10(c)),[42] and seemingly all carriage evidenced by a bill of lading or similar document of title, which falls within the rules. Even carriage not evidenced by a bill of lading, but by a non-negotiable document such as a sea way-bill fall within COGSA, provided such non-negotiable document expressly provides for the amended Hague Rules to apply.

However, Article 1 (b) of the amended Hague Rules defines 'contract of carriage' as only applying to contacts covered by a bill of lading or any similar document of title. The bill of lading developed over time[43] as firstly, a receipt for the goods shipped, and later, as a document embodying the terms of carriage. The bill of lading was originally a non-negotiable document, but as commerce and sea-trade expanded, the need for a negotiable document became pressing and so arose the practice of endorsing the bill of lading to the buyer of the goods as a means of transferring title before the goods arrived at their destination.

The bill of lading is thus:

(i) a receipt for the goods;
(ii) a document representing title in the goods; and
(iii) evidence of the contract of carriage.

It is evidence of the contact of carriage either because:

(i) the parties reduce their contract to writing in the bill of lading,[44] or
(ii) the parties clearly intend to incorporate the terms of the bill of lading into their contract.[45]

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42 It is perhaps going too far to say that only contracts under Article 10(c) are consistent with s10(1)(b). The bill of lading should evidence the contract anyway (or be part of it) and Article 10 and section 10(1)(b) can easily be read together. On this point, see Butler D. A. & Duncan W. D., *Maritime Law in Australia* (1992) Legal Books, Sydney, at Chapter 3.

43 See as Astle, W.E., *Bills of Lading Law* (1982) Fairplay, London. Merchants originally accompanied their goods on voyages, but as that practice ceased, the document was developed as a separate means of representing ownership.

44 *The Ardennes* [1951] 1 KB 55 at 60; *Cook Island Shipping Co. Ltd* v *Colson Builders Ltd* [1975] 1 NZLR 422, at 440; *Chartered Merchant Bank of India* v *Netherlands India Steam Navigation Co.* (1883) 10 QBD 521 at 528; *Leduc* v *Ward* (1888) 20 QBD 475 at 479–480. This is so unless there is contrary evidence.

So if no other documentation but a bill of lading is issued, it becomes the contract of shipment. If other documentation is issued, it may become part of the contract of shipment. If a charter-party is involved however, the bill of lading will have no contractual status.[46] But what if the document issued is expressed to be not negotiable? Or if no documentation at all is issued?

COGSA s10 (1) (b) (iii) seems to cover the former situation, but only if the amended Hague Rules are expressly applied by the wording of the document. The amended Hague Rules themselves are less clear on this point. Article 1 (b) refers only to bills of lading or similar documents of title. These are negotiable documents. Thus if the bill of lading or other document was marked, or was by its nature, non-negotiable, the amended Hague Rules should not apply. This means that in some circumstances the protection of the amended Hague Rules would be denied to shippers or consignees on the basis that the documentation issued did not fall within the Rules.

Article 6 of the Rules referring to the case of the non-issue of a bill of lading and the issue instead of a non-negotiable receipt in the special circumstances described (not particularly clearly), in order to avoid the application of the Rules, only adds to the confusion.

The Hamburg Rules have a definite advantage on this point because their application is not dependent on documentation. Article 1 paragraph 6 defines a contract of carriage by sea as 'any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another'. Article 2 (1) states further that the Convention is applicable to all contracts of carriage by sea. Thus the Hamburg Rules apply:

(i) whether the document issued is negotiable or not;
(ii) whether documentation is issued or not.[47]

This overcomes the negotiable/non-negotiable problem in the amended Hague Rules, and accords better with modern liner trade practice where either waybills or receipts are used in preference to bills of lading, or no documentation is issued because of computer-tracking of cargo.

Charter-parties are excluded from the Hamburg Rules by Article 2 paragraph 3, as they are under the amended Hague Rules by Article 5. The object of these rules is to protect carriage of cargo in the liner trade, these days

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45 *Pyrene Co. Ltd* v *Scindia Steam Navigation Co. Ltd* [1954] 2 QB 402 at 419.

46 *Temperley Steam Ship Co.* v *Smyth & Co.* [1905] 2 KB 791 at 802; *Kruger and Co. Ltd* v *Moel Tryvan Ship Co. Ltd* [1907] AC 272 at 278. See also O'Hare, C. W., op. cit., at 416–417. The Hague Rules do not apply to charter-parties (Article 5). However, if bills of lading are issued under a charter-party, they must comply with the Hague Rules (Article 5). The same idea is retained in Article 2 paragraph 3 of the Hamburg Rules, perhaps unnecessarily, since the Hamburg Rules do not require in the first instance the issue of a bill of lading at all.

47 Although the Hamburg Rules allow for the requirement of issue of documentation under Article 14 paragraph 1, and Article 15 paragraph 2.

typically containerised,[48] and not bulk carriage by tramp ship. Of the two sets of Rules, the Hamburg Rules deal better with the documentation issue.

2.2.2 Applicability of the Rules — the Geographic aspect

Under the amended Hague Rules, the carriage of goods by sea is only covered if the carriage is outward — Article 10. This is reflected in COGSA Section 10 (1) (b) which refers to contracts of the kind referred to in Article 10 of the Rules. Nothing else in Section 10 expands on this, and Section 11 only reinforces this limitation.

The Hamburg Rules on the other hand, apply to any contract of carriage by sea whether inward or outward — Article 2 paragraph 1 (a) and (b). This means that both exports and imports would be covered, a major advantage for Australia. In addition, many jurisdictional problems would be overcome, since Section 11 (1), COGSA applies Australian law to outward carriage, but foreign law could still perhaps apply to imports despite s11(2). Under the Hamburg Rules, Australian law could be applied to both.[49] Again the Hamburg Rules seem to offer a better solution on this point.

2.2.3 Applicability of the Rules — the period of carrier's responsibility.

Article 1 (e) of the amended Hague Rules states that 'carriage of goods covers the period from the time when the goods are loaded on to the time they are discharged from the ship'. This is commonly known as 'tackle-to-tackle' coverage. Carriers are therefore responsible for goods under the Rules only for the period they are on the ship, and not when they are on the docks, stored in warehouses, or being handled by cargo handlers off ship, even though the goods may have been delivered to the care of the carrier during all those activities. Carriers typically exclude their liability when goods are not actually within the ambit of the Rules.[50] This limitation on carriers' liability is reinforced by Article 7 of the amended Hague Rules.

The Hamburg Rules, however, cover the period 'during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge'. (Article 4 paragraph 1). Paragraph 2 of the same article describes the carrier as being deemed to be in charge of the goods from the time the carrier takes them over from the shipper or person acting on his behalf to the time the goods are handed over to the consignee.

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48 On which problem, see 2.2.4 below. See also Kindred, op. cit. at 592–594. In a typical quarter (to June 1991) 37% of outward sea cargo and 53% of inward sea cargo was by liner service. See ABS, op. cit. at 17–18.

49 On jurisdiction generally, see 2.2.8 below.

50 *Midland Silicones v Scruttons [1962] AC 446; New Zealand Shipping Cco. Ltd v A. M. Satterthwaite & Co. Ltd (the Eurymedon [1975] AC 154; Salmond and Spraggon (Australia) Pty Ltd v Port Jackson Stevedoring Pty Ltd (1978) 144 CLR 300; Milda Electronics Inc. v Mitsui OSK Lines Ltd (1981) 124 DLR (3d) 33. Liability as bailee can be excluded at common law, even for stevedores employed by carriers. See also Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107.*

This is definitely a longer period than is covered by the amended Hague Rules and has been called a 'port-to-port' period of liability.

The actual *meaning* of Article 4 paragraphs 1 and 2 may not, perhaps, be as clear as shippers would have wished, but the *intention* behind the Article is evident. The period of carriers' liability is to be longer, and perhaps more in line with actual commercial practice. This is particularly so in relation to:

(i) the operation of a multi-model transport contract and
(ii) transshipment, neither of which falls within the amended Hague Rules since both involve transport by a carrier beyond the ship's tackle. At that point, the carrier will introduce exclusion clauses to limit his liability.

Article 10 paragraph 1 of the Hamburg Rules seems to deal with both these situations making a carrier responsible for goods until their final delivery.[51] However, there is an exception provided for in Article 11 which may undo the improvements brought about by Article 10, since it allows a carrier to avoid liability for a part of the carriage performed by a named 'actual carrier'. It remains to be seen how Articles 10 and 11 would interact in practice.

So, 'tackle-to-tackle' or 'port-to-port' — which is preferable? Obviously from the shipper's point of view the latter is preferable. Australia as a cargo-owning country should prefer the Hamburg Rules on this point. But there are two possible problems:

(i) Article 4 is unclear as drafted, and
(ii) Article 11 permits an unnecessary exclusion.

Perhaps it should be concluded that the outcome is uncertain on this point of comparison.

2.2.4 Applicability of the Rules — deck cargo

Deck cargo is not covered by the amended Hague Rules — Article 1 (c). A clear distinction is made in those Rules between carriage of goods below deck and carriage of goods above deck. The Hamburg Rules address the issue of deck cargo in Article 9. Article 9 paragraph 1 allows carriage on deck if:

(i) there is an agreement[52] with the shipper to do so; or
(ii) there is 'usage' in the particular trade which allows for deck carriage; or
(iii) there are statutory requirements to carry goods on deck.

Any deck carriage not in accordance with Article 9 (1) or (2) attracts a higher degree of liability than is otherwise applicable in the Hamburg Rules, in that the carrier may not show lack of fault on his part under Article 5 (1).

The possibilities here are that the Hamburg Rules approach is preferable since containerisation makes a distinction between above and below deck

51 The actual carrier for a particular leg is also liable of course — Article 10 paragraph 2.
52 'Agreement' is not defined. It would include, perhaps, a liberty clause in a bill of lading. 'Express agreement' is used with a different meaning in Article 9(4).

carriage unnecessary, or even ludicrous, since liability under the Rules would attach to containers stacked below the deck line, but no liability would attach to containers stacked above the deck line, other than that at common law for fundamental breach of contract.[53]

Surely, the same level of liability should apply to all the containers regardless of where they are stacked? The Hamburg Rules certainly broaden the right of carriers to carry cargo on deck, which should not matter if all the cargo is containerised. If the cargo is not containerised, Article 9 is of doubtful value as an advance on the amended Hague Rules, since to carry goods on deck, contrary to agreement that they are 'deck cargo' and therefore outside the Rules, would probably constitute a fundamental breach of contract.[54]

2.2.5 Applicability of the Rules — live animals.

Article 1(c) of the amended Hague Rules excludes live animals from the definition of 'goods'. However, the Hamburg Rules define 'goods' as including live animals in Article 1(5). This is of obvious importance to Australia since our exports by sea of live animals in the quarter ending June 1991 were over 60,000 tonnes GWT worth over $30,000,000.[55] This is a small, but significant, segment of the export market and can only realistically be carried by sea in order to give an economic return. On this point of comparison, the Hamburg Rules are clearly preferable. However, if most of the carriage of live animals is under charter parties, there may be little effect overall.

2.2.6 The Basis of Liability and Exemptions Available.

The carrier's obligation under the amended Hague Rules is contained in Article 3 paragraphs 1 and 2. The carrier shall be 'bound before and at the beginning of the voyage to exercise due diligence to:-

(a) Make the ship seaworthy.
(b) Properly man, equip and supply the ship.
(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and presentation.'[56]

The carrier is also obliged, subject to Article 4, to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.[57]

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53 Which, although a powerful sanction, still gives differing types of liability attaching to what are the same type of objects, wherever stacked on board.

54 See Tetley, W., *The Hamburg Rules — A Commentary* (1979) Lloyds Mar. and Comm. LQ 1.

55 And growing typically by about 10–15% per quarter on figures obtained from the ABS. See ABS, *Shipping and Air Cargo Commodity Statistics Australia* June Quarter 1991 (21 April 1992) at p.9.

56 Article 3(1) amended Hague Rules.

57 Article 3(2) amended Hague Rules.

This seems a satisfactory liability regime at first glance, a view supported by Article 3 paragraph 8 of the amended Hague Rules which renders void any clause in a bill of lading purporting to limit or avoid Article 3 liability. In addition, Article 5 of the amended Hague Rules allows the liability of the carrier contained in a bill of lading to be increased by agreement.

Since the carrier's obligation cannot be avoided totally, but can be increased, the amended Hague Rules obligation is a minimum one. Following this minimum obligation is a list of 17 exceptions to carrier and ship liability, some of which are the traditional defences of carriers faced with absolute liability for cargo.[58] It may be argued that they are out of place in a liability regime that is not absolute.

The order of burden of proof required is as follows:[59]

(a) The *shipper or cargo owner* must make a prima facie case against the carrier by showing that the goods were not discharged from the ship in as good condition as they were in when delivered by the shipper;
(b) The *carrier* then has the burden of proof to bring the cargo loss or damage within one of the exceptions in Article 4 of the amended Hague Rules;
(c) If the carrier can show that one of the exceptions applies, the *shipper or cargo owner* must then prove unseaworthiness. The unseaworthiness must be shown to be the cause of the loss or damage.[60]
(d) The *carrier* must then show that due diligence was exercised to avoid liability — Article 4(1).

Thus, even if carrier cannot show that one of the Article 4 (2) exceptions applies, there may still be no carrier liability because due diligence is shown in making the ship seaworthy, and in stowing and caring for the cargo.

Under the Hamburg Rules, the principle of presumed fault and neglect is retained in Article 5 paragraph 1. The carrier is 'liable for loss resulting from loss of or damage to goods, as well as from delay in delivery . . . unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences'. Article 23(1) makes clauses avoiding or limiting this liability void, and Article 23(2) allows for increases in carrier liability by agreement. At this point, the Hamburg Rules appear very similar to the amended Hague Rules. Has anything changed?

The differences are these:-

(a) The Hamburg Rules have a single standard of care for goods encompassing the responsibility of a carrier for seaworthiness of the ship,

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58 See Article 4 paragraph 2 amended Hague Rules.
59 See Kimball, J. D., op. cit. at 223–226; Chandler, G. F., *A Comparison of COGSA, The Hague/Visby Rules, and the Hamburg Rules* (1984) 15 J. Mar. L & Comm. 233; and Selvig, E., *The Hamburg Rules, the Hague Rules and Marine Insurance Practice* (1981) 12 J. Mar. L & Comm. 299 21 305–307.
60 Or at least some other breach of the carrier's responsibility, such as thaat contained in Article 3(2).

and for proper loading, stowage, care and discharge of the cargo. This statement of the basis of liability would seem preferable to the requirements of Article 4(1) and (2) of the amended Hague Rules;

(b) The Hamburg Rules do not contain the list of exceptions contained in Article 4(2) of the amended Hague Rules. This does not mean that such defences are not still available. Indeed, Article 4(2)(b)-(q) are probably still available[61] but encompassed by the requirement of the carrier to take reasonable care of the cargo;

(c) However, the principle of error in navigation as a defence has been abolished. This was a much litigated principle and regarded as an archaic defence,[62] since it offered broad relief to carriers on the basis that a carrier's obligations are almost wholly performed by employees, and no liability could arise unless a carrier intervened in the management of the carriage personally;

(d) Under the Hamburg Rules, the burden of proof requirements are simplified. Once the cargo owner shows that loss or damage occurred during the carriage, the *carrier* has the burden of proof throughout under Article 5(1). The only major burden of proof requirement for the cargo owner under the Hamburg Rules is in the case of fire;

(e) The fire exception (Article 5 Paragraph 4) retains the requirement of burden of proof on the cargo owner. The Hamburg Rules may well be regarded as less stringent in this regard than the amended Hague Rules, because under the latter rules the fire exception could only be invoked by the carrier if the carrier had first proved due diligence.[63] Under the Hamburg Rules, the cargo owner must prove both lack of due care, and that the carrier is liable for the fire.[64]

(f) Article 5(1) requires the exercise of reasonable care for the entire period of the carriage. If the 'all reasonable measures' requirement can be equated to 'due diligence' under the amended Hague Rules, this is a change in favour of the cargo owner. The movement to a standard of reasonable care in all the circumstances would certainly seem to be in step with the modern case law on negligence in general;

(g) There is no express provision dealing with damages for delay in the amended Hague Rules.[65] In the Hamburg Rules, the general liability

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61 Ibid, although the fire exception is dealt with perhaps less stringently under the Hamburg Rules. See (e) below.

62 Ibid. Cases drew the distinction between negligent navigation of the ship, and mismanagement of the cargo. See *Gosse Millerd* v *Canadian Government Merchant Marine* [1928] 1 KB 717; *Minnesota Mining & Manufacturing (Australia) Ltd* v *The Ship Novoaltaisk* [1972] 2 NSWLR 476; *Chubu Asahi Cotton Spinning Co. Ltd* v *The Ship Tenos* [1968] 12 FLR 291 at 301; *Foreman and Ellams Ltd v Federal Steam Navigation Co. Ltd* [1928] 2 KB 424.

63 See Article 4(2)(b).

64 Article 5(4)(a)(i) and (ii) Hamburg Rules. Article 5(4)(b) does not appear to offer cargo owners much assistance, since it does not go beyond the normal survey requirements.

requirement also includes liability for delay — Article 5(1). The cargo owner must give notice within 60 days (Article 19(5)), and the claim is limited to 21/2 times the freight paid on the goods delayed and never more than the total freight (Article 6(1)(b)). After 60 days, the cargo owner may treat the cargo as lost (Article 5(3)). It is uncertain whether the Hamburg Rules have produced any improvement here. The rules on delay seem unduly complicated, and what would have been a straightforward liability for delay by the carrier in Article 5(1) is then weakened by Articles 5(2), 5(3) and 6(1)(b). Perhaps this is a case of a win for the carriers;

(h) Vicarious liability for employees of the carrier is extended under the Hamburg Rules. Again, this is in line with the general law of negligence, and is realistic in view of the standard of communications available on modern liner services;

(i) The time for the bringing of an action is extended under the Hamburg Rules to two years — Article 20 paragraph 1, and may be further extended (Article 20(4)). This time limit is one year under the amended Hague Rules (Article 3 paragraph 6). In indemnity actions against third parties, the time may in both cases be extended beyond the original 2 years or 1 year respectively.[66] Carriers would find this change unhelpful, but it is of definite benefit to cargo owners.The advantages for the cargo-owner arising from these changes are:

(a) A single basis for liability.
(b) A simplified burden of proof requirement:
- The cargo owner proves that cargo is not discharged in as good condition as it was in when delivered to the carrier — a prima facie case against the carrier;
- The carrier has the burden of showing that he took all measures that could reasonably have been required.

(c) The reasonable care requirement has a longer period of coverage and no exception for error in navigation.

The disadvantages for the cargo-owner include:

(a) Determining the meaning of terms such as 'occurrence' and 'all measures that could reasonably be required' in Article 5(1) — these are somewhat vague and open to litigation;
(b) Unravelling the delay provisions in Article 5 which present difficulties of interpretation;[67]

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65 Viz, by providing for vicarious liability for employees in the cases of fire and mismanagement of the ship.

66 Article 3(6 bis) of the amended Hague Rules and Article 20(5) Hamburg Rules.

67 Particularly Article 5(3) on treating the goods as lost after 60 days. How is this to be done? Who will own the goods after abandonment? Will the bill of lading have any meaning at that point? Also how are strikes to be dealt with? Could carriers avoid the delay provisions by making agreed time of delivery a long time in the future? See Diamond,

(c) The carrier will still only be liable for presumed fault or neglect. Where there is no fault or neglect by the carrier, the cargo owner will have, as under the amended Hague Rules, no remedy but cargo insurance.[68]

(d) The carrier may still limit liability where the Hamburg Rules do not apply. This is particularly a problem given that aspects of the Hamburg Rules are not yet interpreted, such as the meaning of the apparent 'port-to-port' coverage, transshipment provisions, and provisions which seem to relate to multi-modal transport contracts.[69]

On balance, whilst the Hamburg Rules do not offer an optimal solution on a liability regime,[70] they do appear to offer the better solution on this point of comparison to cargo owners. Therefore, Australia's interest would again seem to lie in adopting the Hamburg Rules provided difficulties of interpretation can be resolved.

2.2.7 *Unit Limitation of Liability*

From the above discussion, it would seem that cargo owners have just won another round in the liability battle. However, carriers who are liable under the rules do not have unlimited liability. Their liability is limited in both sets of Rules by applying formulae which fix the maximum amount recoverable. The cargo owners' victory is definitely not unqualified.

In the original Hague Rules, the limitation was expressed as 100 pounds per package or unit. (See 2.1.10 above.) This became, after amendments to the Hague Rules, the current 666.67 units of account per package or unit or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher (Article 4(5)(a)).

The idea behind the amendments was to take account of:-

(a) Fluctuating exchange rates, especially a problem when currencies are floating, such as the Australian dollar. Even if the float is dirty, ie. interfered with by the Central Bank, the fluctuation can substantially affect damages awards;
(b) Inflation effects on the value of goods; and
(c) Changes in shipping technology to containerisation of cargo.

None of these was a problem when the original Hague Rules were drawn up, and, since then, containerisation has proved a particular problem. Under the original Hague Rules, the approach to container cargo was either:[71]

A., *Responsibility for Loss of or, Damage to, Cargo on a Sea Transit. The Hague or Hamburg Conventions* in Koh Soon Kwang, P., *Carriage of Goods by Sea* (1986) Butterworths, Singapore at 119–120.

68 On insurance, see 3.1 below.

69 See 2.2.3 above.

70 Which could hardly be expected of an International Convention formulated by a large number of countries having divergent, or even antipathetic, interests.

(a) To treat a container of cargo as a single unit if the documentation disclosed it as such;[72] or
(b) To treat the contents of a container as units of cargo if they are itemised in the documentation;[73] or
(c) To treat the contents as separate units if they could viably be shipped free of the container.[74]

The Visby Protocol did not offer any real assistance in this area because the Poincaré Franc was subject to the same problems as the original limitation regime. However, the Visby Protocol did codify the case law on units of carriage in the sense that it provided that:-

(a) Where cargo is itemised in the bill of lading, though packed in a container, the individual items will be the 'units' for calculation purposes; and
(b) Where cargo is packed in a container but not itemised in the bill of lading, the whole container will be the 'unit' for calculation purposes — Article 4(5)(c).[75]

The SDR Protocol was designed to overcome the problems associated with the fluctuations in national currency exchange rates. The Special Drawing Right of the International Monetary Fund (IMF) is calculated by reference to a basket of currencies[76] and gives a fixed point for calculation of damages in local currencies.

The Hamburg Rules retain the SDR reference, but the limit per unit or kilo is raised. The liability under the Hamburg Rules is 835 SDR's per package or other shipping unit or 2.5 SDR's per kilo of gross weight, whichever is the higher (Article 6(1)(a)). The rules as to containers are retained in Article 6(2)(a), but the container itself, if lost or damaged, and not owned by the carrier, is a separate shipping unit for the purpose of calculation of damages.

An increase in the limits available to cargo owners must be an advantage to them, but the limits still do not take account of inflation, and in consequence, can give a rather inadequate level of compensation. Other problems arising here are:[77]

(a) Trade partners are not necessarily members of the IMF so problems of currency valuation will still arise;[78]

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71 See O'Hare, C. W., *Cargo Claim Limitations and the Hamburg Rules* (1978) ABLR 287 at 290–293.
72 *Encyclopedia Britannia Inc.* v *SS Hong Kong Producer* (1969) 422 F 2d1; *United Purveyors Inc.* v *MV New Yorker* (1965) 250 F Supp 102.
73 *Leather's Best Inc.* v *SS Mormaclynx* (1970) 451 F 2d 800; *PS Chellaram & Co. Ltd* v *China Ocean Shipping Co.* [1989] 1 Lloyds Rep. 413.
74 *Carneco* v *SS American Legion* (1974) 514 F 2d 1291.
75 Or of course, the alternative weight limitation formula could be used.
76 The leading currencies are used viz $US, £88stg, Japanese yen, FF, and DM. The value in Australian dollars is around $1.80 at current rates of exchange.
77 See also O'Hare, op. cit. at 298–299, Kindred, op. cit. at 616–617.
78 See Article 26 Hamburg Rules for the limitations applied to non-IMF members.

(b) The clause relating to 'unless the nature and value of the goods have been declared by the shipper before shipment' in the amended Hague Rules has been omitted from the Hamburg Rules. This would imply that the limitation formula in the Hamburg Rules applies regardless of the type of cargo and the freight paid;
(c) The loss of the limitation in Article 6, provided for in Article 8(1) of the Hamburg Rules seems to cast the burden of proof on the cargo owner. This burden of proof would be difficult to discharge because of the requirement that the cargo owner prove subjective intent and knowledge.

The Hamburg Rules thus offer the following advantages here:

(a) Increased limits for damages.
(b) Unit or weight alternatives.
(c) Containers etc. as separate shipping units.

Their disadvantages are:

(a) Not all countries are IMF members;
(b) The SDR limits still do not account for the effects of inflation and may be paltry in some cases;
(c) The limits provided do not compare favourably with limits allowed in other forms of transport convention;[79]
(d) The cargo owner faces a difficult burden of proof in establishing that a carrier should lose his right to limit liability under Article 6. In addition to this difficulty, the necessity to prove intent or knowledge may do away with the concept of fundamental breach which may have operated more broadly under the amended Hague Rules.

Overall, the effect of the changes in the Hamburg Rules on this point is equivocal at best for cargo owners.

2.2.8 Jurisdiction

Section 8 COGSA states that subject to section 10, the amended Hague Rules have force of law in Australia. Section 10 confines their coverage to contracts of the type described in Article 10 of the Rules.[80]

Section 11(1) COGSA applies Australian law to the contract of carriage by sea from any place in Australia, while Section 11(2) makes a clause in a bill of lading ousting Australian jurisdiction in this respect of no effect. Thus, Australian law applies and Australian Courts have jurisdiction over

79 For example, the limitations on liability of air cargo under the Warsaw Convention of 1929, as amended by the Hague Protocol of 1955 and the Guadalajara Convention of 1961 set limits of 250 Poincaré franc per package, plus 5000 Poincaré francs per passenger regarding objects carried by the passenger. See Civil Aviation (Carriers Liability) Act 1959 (Cth) and the Civil Aviation (Carriers Liability) Amendment Act 1991 (Cth) which applies the Montreal Protocols to give limits of 17 SDRs per kilogram in the case of loss, damage or delay to cargo.

80 See 2.2.1 above.

disputes for contracts of carriage by sea evidenced by bills of lading. Cargo owners in Australia are able to pursue their rights under contracts of carriage by sea in Australian courts at all times.[81]

The enactment of Section 11 COGSA follows logically from the fact that the amended Hague Rules do not define the place where an action may be brought. Therefore, in Australia, we would naturally prefer that all jurisdiction should be Australian, especially in relation to cargo — owners' actions.

The Hamburg Rules deal with jurisdiction in Article 21. The courts that may hear a claim by a plaintiff have been defined in paragraph 1 of that Article as being in one of the following places:-

(a) The principal place of business, or, in the absence thereof, the habitual residence of the defendant; or
(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made or;
(c) The port of loading or the port of discharge or;
(d) Any additional place designated for that purpose in the contract of carriage by sea.

Article 21(3) provides that no judicial proceedings relating to carriage of goods may be brought in a place not specified in paragraph 1 or paragraph 2. (Paragraph 2 deals with arrest of ships. Action may be commenced in the place of the port of arrest or be removed at the request of the carrier to one of the places in paragraph 1.) Article 21(5) allows for an agreement between the parties as to jurisdiction to be made after the claim by the plaintiff has occurred.

Are there any improvements brought about in the Hamburg Rules? The purpose of the Article 21 is to replace the choice of law and choice of forum clauses inserted by carriers in bills of lading which limit the remedies for cargo owners, particularly those clauses which evidence abuse of economic power by carriers.[82]

Article 21 has perhaps achieved that by allowing a wider range of fora, and hence available remedies, to cargo owners. However, two problems remain:

(a) The use of the word 'plaintiff' in Article 21 could refer to either carrier or cargo claimants, and so might be regarded as undermining the purpose of the Article and;
(b) Australia's COGSA makes clear by s 16 (not yet in force) that it is Australian jurisdiction which will apply.

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81 *Compagnie des Messageries Maritimes v Wilson (1954) 94 CLR 577, Kim Meller Imports Pty Ltd v Eurolevant Spa (1986) 7 NSWLR 269, Somez-Denizcilik ve Ticaret Anonim Sirketi v MV Blooming Orchard (The Blooming Orchard) (No. 2) (1990–91) 22 NSWLR 273. The same principle applies to attempts to oust arbitration jurisdiction (see 2.2.9). See also Butler and Duncan, op. cit. at 79–80.*

82 See Sweency, J. C., op. cit. Part 1 at 95–101. Carriers can choose applicable law or fora unable to be accessed by cargo owners, especially those from developing countries, who may find forum shopping expensive.

It may be concluded that Article 21 of the Hamburg Rules would not be of any effect if Australia adopted the Hamburg Rules because of the operation of s 16 COGSA. The overall effect of the adoption of the Hamburg Rules thus would be neutral on this point of comparison.

2.2.9 Arbitration

It has been held that the same principle in COGSA relating to jurisdiction also relates to arbitration: see *The Blooming Orchard (No. 2)* (1990–91) 22 NSWLR 273, where a clause in a voyage charter party requiring arbitration in London has held to be invalid. Thus, Australian jurisdiction should not be able to be ousted by an arbitration clause providing for arbitration in, say, London.

The amended Hague Rules contain no provisions on arbitration of disputes. Arbitration clauses are most commonly found in charter parties to which neither set of rules apply. However, arbitration clauses are used in bills of lading, or can be incorporated by reference into a bill of lading issued under a charter party.

Therefore, because of increasing use of arbitration to settle disputes, the Hamburg Rules do contain a provision dealing with arbitration clauses (Article 22). Article 22(1) provides that arbitration clauses in contracts of carriage are valid provided they are agreed to in writing by the parties. Article 22(3) allows for arbitration proceedings to be instituted, at the option of the claimant, at one of the following places:

(a) a place in a State within whose territory is situated:
    (i) the principal place of business of the defendant, or in the absence thereof, the habitual residence of the defendant; or
    (ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
    (iii) the port of loading or the port of discharge; or
(b) any place designated for that purpose in the arbitration clause or agreement.

This provision is subject to the same comments made in relation to jurisdiction. Australia supports the right for an Australian claimant to arbitrate in Australia. Hence, Sections 11 (2) and 16 (2) COGSA would render the effect of the adoption of Hamburg Rules.

2.2.10 Third Parties and the Rules

The original Hague Rules did not deal with the implications of liability for employees, agents and subcontractors of carriers. Therefore, although a particular country may have adopted the Hague Rules, national law was applied to determine the liability of these third parties.

When a cargo owner finds himself unable, because of limitations on liability granted by the Hague Rules, to bring an action against a carrier, he may seek to pursue the ship's master or crew, or the carrier's agents,

stevedores or warehouse employees. The difficulty with this type of action, at least in English law terms, is lack of privity of contract between cargo-owners and third parties. The issues then become:

(a) are third parties liable to the cargo owner?
(b) if they are liable, can they take advantage of the exceptions and limitations of liability allowed in the Rules?

As to (a), it would appear that third parties may be liable to cargo-owners either:

(i) in tort or
(ii) in contract through the construction of an agency with the carrier.

In cases involving actions in tort, the carrier, though probably a bailee, would be exempt because of the use of valid exclusion clauses outside the 'tackle-to-tackle' coverage of the Hague Rules.[83] This leaves the cargo owner to pursue the third parties for negligence in loading, unloading, handling or storing cargo. However, even then, third parties have been permitted to take advantage of Hague Rules Limitations.[84]

But in *Wilson* v *Darling Island Stevedoring & Lighterage Co Ltd*,[85] the third party stevedores were declared 'complete strangers' to the contract, and could not take advantage of the limitations in the carrier's bill of lading. This decision overruled the earlier decisions on this point,[86] affirmed *Adler* v *Dickson (The Himalaya)*,[87] and was followed by *Scruttons Ltd* v *Midland Silicones Ltd*.[88]

In the *Midland Silicones* case, the possibility of privity of contract arising between cargo owner and third party by agency from the carrier was mentioned.[89] This led to the insertion in bills of lading of the so-called 'Himalaya' clause. A *Himalaya* clause is to the effect that carriers are contracting not just for themselves, but also on behalf of their servants, agents and independent contractors.

Himalaya clauses were examined in several leading cases,[90] with the overall result that they may be effective if:

(i) the clause clearly indicates that the carrier is contracting not only on his own behalf, but also on behalf of the third party or parties;

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83 See 2.2.3 above. If the carrier has no exclusion clause, however, the carrier would be liable in tort under the unamended Hague Rules.

84 *Elder Dempster & Co. Ltd v Patterson Zochonis & Co. Ltd [1924) AC 522; Gilbert Stokes & Kerr Pty Ltd v Dalgety & Co. Ltd (1948) 48 SR(NSW) 435; Waters Trading Co. Ltd v Dalgety & Co. Ltd (1951) 52 SR(NSW) 4.*

85 (1956) 95 CLR 43.

86 Especially those in note 84.

87 [1955] 1 QB 158.

88 [1962] AC 446. The earlier cases were held to be not true cases in tort, but rather, situations where privity had been inferred.

89 Per Lord Reid at 474.

90 *New Zealand Shipping Co. Ltd v A. M. Satterthwaite & Co. Ltd [1975] AC 154; Port Jackson Stevedoring Pty v Salmond and Spraggon (Aust.) Pty Ltd (1978) 139 CLR 231 (HC); (1980) 144 CLR 300 (PC).*

(ii) the clause clearly indicates that the third party is covered;
(iii) the third party has given prior authority to the carrier to contract on his behalf,[91]
(iv) the third party has provided sufficient consideration.[92]

A clause of this sort may also be effective if:

(i) the clause clearly indicates that the third party benefit is held on thrust for the third party; or
(ii) estoppel operates to prevent the cargo-owner from requiring privity of contract to be present between himself and the third party.[93]

In addition to the common law decisions in this area, privity of contract is not required between a cargo owner and a third party who has a benefit conferred on him by a contract, by virtue of Section 55 of the *Property Law Act* 1974 (Qld), Section 11 of the *Property Law Act* 1969 (WA), and the *Contracts (Privity) Act* 1982 (NZ). In these jurisdictions the benefit conferred should include the limitations available under the Hague Rules.

The amended Hague Rules[94] added Article 4 bis to the original liability regime. This Article extends the defences and limits of liability in the Rules to the carrier whether the action is brought in contract or in tort. Therefore, even if the carrier has no exceptions for the period beyond 'tackle-to-tackle' during which he is bailee of the goods, the carrier can avail himself of the monetary and time limitations, as well as all the defences in the Rules (Article 4 bis (1)).

Article 4 bis (2) extends the same protection to the servants or agents of the carrier. However, the protection is not extended to independent contractors. Nor is it available to servants or agents if the loss or damage is caused with intent, or recklessly and with knowledge that damage would probably result (Article 4 bis (4)).

Therefore, the current position in Australia is that:

(a) the defences and limitations of the amended Hague Rules are available to the carrier whether the action is brought in contract or tort; and
(b) the defences and limitations of the amended Hague Rules are available to servants or agents of the carrier, but not to independent contractors.

If the carrier wishes to protect independent contractors, clauses of the Himalaya type would still be necessary.

Is there any difference under the Hamburg Rules? Article 7 (1) applies the Rules similarly to Article 4 bis (1) of the amended Hague Rules. The defences and limitations are available 'whether the action is founded in contract, in tort

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91 Or later ratification may be allowed.
92 Usually in the form of performance of his contractual duty.
93 See *Trident General Insurance Co. Ltd* v *McNiece Bros Ltd* (1988) 165 CLR 107.
94 By the Visby Protocol, Article 3 of which inserts Article 4 bis into the Hague Rules. See also O'Hare, C. W., *Shipping Documentation for the Carriage of Goods and the Hamburg Rules* (1978) 52 ALJ 415 at 427–430, and Butler and Duncan, op. cit. at 121–123.

or otherwise'. Article 7 (2) again extends these defences and limitations to servants or agents, but there is no mention at all of independent contactors.

The problems arising here might be:

(a) are independent contractors excluded?
(b) if so, why are they not referred to at all?
(c) are independent contractors to be subsumed in the 'servant or agent' category?
(d) if so, why not mention them specifically?
(e) what is the meaning of, 'within the scope of his employment', a requirement not present in the amended Hague Rules?

On this point of comparison there seems to be little difference between the Rules. If independent contractors are not covered by the Hamburg Rules, Himalaya type clauses will still be necessary in contracts of carriage. This might be true a fortiori if the "within the scope of his employment' requirement narrows the operation of Article 7 to certain specified (how specified?) activities.

2.2.11 Other Points of Comparison

	Amended Hague Rules	**Hamburg Rules**
(A) Definitions (i) Carrier	Article 1(a) refers only to owner or charterer.	Article 1(1) is broader. Article 1(2) defines actual carrier, which overcomes problems of contracts involving sub-carriage.
(ii) Shipper	not defined	defined in Article 1(3).
(iii) Consignee	not defined	defined in Article 1(4).
(iv) Goods	excludes live animals and deck cargo	includes live animals and containers. Deck cargo is dealt with separately in Article 9.
(v) Ship	defined in Article 1(d)	not defined and unnecessary since the period of coverage goes beyond the time cargo is on a ship.
(vi) Contract of carriage by sea	Article 1(b) defines contract of carriage as evidenced by a bill of lading or similar document of title. Carriage of goods' is also defined in Article 1(e) in temporal terms	Article 1(6) actually defines the contract. The contract definition takes account of the possibility of a carrier and an actual carrier being involved in the carriage of goods.
(vii) Bill of lading	not defined though contents are listed in Article 3(3)	defined in Article 1(7). The purpose of this definition is perhaps to help differentiate contracts including bills of lading and contracts which do not include such documents.

(B) Actual carrier	not dealt with	the carrier is responsible for the entire carriage — see Article 1(2), 10, and 15(1)(c) which ensure carrier responsibility.
(C) Contents of the bill of lading	Article 3(3) requires little detail	Article 15(1) requires a large amount of detail, but could be easily by-passed because the Hamburg Rules do not require the issue of a bill of lading. Some carriers (and shippers) feel the detail required is onerous and an invitation to theft.
(D) Deviation	Article 4(4) deviation permitted to save life or property, or for any other reasonable purpose.	Article 5(6) — deviation permitted to save life, or to save property if reasonable. This is narrower than the amended Hague Rules.
(E) Notice of loss requirements.	Article 3(6) for non-apparent damage — 3 days. Article 3(6) for other damage — at time of delivery.	Article 19(2) for non-apparent damage — 15 days. Article 19(1) extended to one day after delivery, and by the consignee. The consignee requirement is narrower than the requirement in the amended Hague Rules. This seems to add little to the amended Hague Rules.
(F) General average	Article 5 allows for general average clauses provided they are 'lawful'	Article 24 seems to go further than Article 5, and refers to the insertion, application and adjustment of general average by national law. It does not refer to the lawfulness of the general average clause to be used in the contract of carriage.
(G) Obligations of the shipper: (i) Dangerous cargo	Article 4(6) provides for unlimited liability by the shipper (except as to general average if any)	Articles 13 and 15(1)(a) are similar, except that the carrier may discharge the goods in more specific circumstances under Article 13.
(ii) Liability of the shipper	Article 4(3) — shipper not liable without 'the act fault or neglect or the shipper, his agents or his servants'.	Article 12 — retains the fault or neglect requirement, and is largely similar.

2.2.12 The Comparison Complete

The comparison of the amended Hague Rules and the Hamburg Rules may be summarised as follows from the point of view of the cargo-owner:

Category	Amended Hague Rules	Hamburg Rules	Uncertain Outcome or Neutral Outcome
(a) application of the rules — documentation requirement		x	
(b) application of the rules — geographic aspect		x	
(c) application of the rules — period of carriers' responsibility			x
(d) application of the rules — deck cargo			x
(e) application of the rules — live animals		x	
(f) basis of liability and exemptions		x	
(g) unit limitation of liability			
(h) jurisdiction			x
(i) arbitration			x
(j) third parties			x
(k) definitions		x	
(l) other points of comparison (on balance)		x	

Australia and New Zealand, as cargo-owning countries, are faced with a number of uncertainties in deciding whether or not to adopt the Hamburg Rules. Do they clear away the fog, or are there just as many uncertainties present as under the amended Hague Rules?

It is apparent that there are uncertainties, but they are perhaps less perplexing than those present under the amended Hague Rules. But these uncertainties can only be settled after adoption of the Hamburg Rules and judicial interpretation of them.

3. CONCLUSION — WHICH RULES?

3.1 The comparison from Australia's point of view

Enemies of uncertainty might say that adoption of the Hamburg Rules by Australia, or any country, will only add a third dimension to the problems of international regulation of contracts of carriage of goods by sea. This will be because there will be three regimes in operation simultaneously — the unamended Hague Rules, the amended Hague Rules, and the Hamburg Rules.

Those with an existential turn of mind might even perceive a fourth dimension in that some countries apply the various rules in forms peculiar to their own circumstances.[95] What, then, is Australia to do? We can either:

95 For example, the US COGSA (1936) reflects both Hague Rules and aspects of the Harter

(a) stay with the amended Hague Rules now applicable, and backed up by considerable case law and insurance industry support; or
(b) move to the Hamburg Rules in late 1994, or at least this century, thus giving the lead to our trading partners, and signalling the perhaps inevitable adoption of the Hamburg Rules by all countries.

If some or all of the perceived uncertainties in the Hamburg Rules turn out not to be sources of complication at all, cargo-owning nations should adopt them since they do, on balance, seem to increase carrier liability.[96] Will this mean previous case-law is inapplicable? Some of it will inevitably be redundant, but many of the basic principles of the amended Hague Rules are retained in the Hamburg Rules.[97]

Therefore, arguments based on the necessity to keep the amended Hague Rules because of the waste of time and money spent on litigation can be refuted on two bases:

(a) the previous case law could still in many instances be applicable;
(b) it is never the case that the law is immutable, so why should it be in relation to contracts of carriage of goods by sea?

Another argument which has been raised against changing to the Hamburg Rules concerns insurance. Carriers have no property interest in cargo. Therefore, their insurance cover in relation to cargo is liability insurance. To provide this cover, they form protection and indemnity clubs (P & I Clubs). P & I Clubs consist of ship-owners who join together to form a pool from which indemnity claims against liabilities to cargo-owners can be paid.

Under the amended Hague Rules, P & I Clubs limit their liability to the amount required under the Rules. Naturally, if the Hamburg Rules are adopted, these limits are higher and therefore necessitate larger payments out of the pool.

Cargo-owners have a property interest in their cargo and cargo insurance provides protection against cargo loss or damage on this basis. Cargo insurance can account for a significant part of the cost of transporting goods by sea.

On the loss of or damage to cargo, the cargo-owner is indemnified for the loss by the cargo insurer who then subrogates the cargo-owner's rights and claims against the carrier or the carrier's insurer if the carrier is liable. This is the well-understood and accepted practice of marine insurance.

Adopting the Hamburg Rules would not change the need for P & I Clubs or cargo insurers. However, it would, by shifting the balance of liability to the carrier, cause a difference in insurance costs to the various parties.

Act 1893.

96 See the discussion on application of the rules and basis for liability and exemptions particularly on this point.

97 Eg the presumption of fault and defences available (except navigational error). See also Gronfors, K., *The Hamburg Rules — Failure or Success?* (1978) J. Bus. L. 334.

Carriers' insurance would increase, and cargo-owners' would decrease. An increase in insurance cost to carriers would be passed on as increased freight rates. Therefore, the cargo-owner pays less insurance, but more freight, so there is no cost advantage for the cargo-owner in the adoption of the Hamburg Rules. However, is this an accurate interpretation of the outcome on costs?

The total volume of premiums to insurers will not be necessarily less, but will be altered. Cargo-owners requiring less insurance will mean a lower premium income to cargo insurers, while P & I Clubs payments will rise, but so will their premiums. It is argued that because P & I premiums are higher than cargo premiums, the fall in cargo-owners insurance may be less than the corresponding increase in freight rates.

On the other hand, this situation may not occur because:

(a) insurance is very competitive and premiums may not move in as volatile a manner as predicted; and
(b) P & I liner premiums do not necessarily move in full tandem with cargo liability payments.[98]

At best, the cost effects of adoption of the Hamburg Rules are uncertain. It may be that cargo owning countries would be willing to bear increased freight rates if the increase in carrier liability is sufficiently advantageous for them.

Therefore, which Rules? From Australia's point of view:

(a) applying s.3(1)(a) of COGSA; and
(b) assuming the Hamburg Rules favour cargo-owners, Australia as a cargo-owning nation[99] should adopt them.

However, given s.3(1)(b) of COGSA, Australia, while not foregoing a commitment to the adoption of the Hamburg Rules, should proceed at a steady pace. If we are to have a regime of marine cargo liability that is *compatible* with the arrangements existing in our major trading partners, an immediate change to the Hamburg Rules would be premature.

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98 In Australia, Marine Insurance in 1990 was as follows:

	$M Direct Premiums	Premium Income	Outstanding Claims
Private	286	236	157
Public	15	11	5

Source: Annual Report of Insurance and Superannuation Commission, 1991.

99 And a fortiori, New Zealand.