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Abstract

In a world comprising cargo owning nations, and ship owning nations, and where most nations are both, there is a continual balancing of risk allocation concerning the damage or loss of sea-borne cargo. This conflict is between the ship owning interests and the cargo owning interests and poses the following questions: who bears the risk, and, under what rules of risk allocation should the world's sea-borne cargo cross the oceans? Should the ship owner/carrier have the liability for loss or damage while the goods are in their possession? Should governments withdraw from trying to regulate a commercial transaction and leave it to the parties to determine the extent of liability?

This conflict is not new, nor is it ever likely to be resolved with all parties satisfied. The most each interested party could hope for is a 'best possible alternative: a 'win, win' situation.' Is this likely to be achieved under the possible introduction of the Hamburg Rules which came into force internationally on the 1st November, 1992?

Keywords

Hamburg Rules, international trade, shipping liability, Australia, New Zealand

THE HAMBURG RULES: SHOULD THEY BE IMPLEMENTED IN AUSTRALIA AND NEW ZEALAND?



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Introduction

In a world comprising cargo owning nations, and ship owning nations, and where most nations are both, there is a continual balancing of risk allocation concerning the damage or loss of sea-borne cargo.¹ This conflict is between the ship owning interests² and the cargo owning interests³ and poses the following questions: who bears the risk, and, under what rules of risk allocation should the world's sea-borne cargo cross the oceans? Should the ship owner/carrier have the liability for loss or damage while the goods are in their possession? Should governments withdraw from trying to regulate a commercial transaction and leave it to the parties to determine the extent of liability?

This conflict is not new,⁴ nor is it ever likely to be resolved with all parties satisfied. The most each interested party could hope for is a 'best possible alternative: a 'win, win' situation.' Is this likely to be achieved under the possible introduction of the *Hamburg Rules* which came into force internationally on the 1st November, 1992? To answer this, it is important to determine the effect of the *Hamburg Rules*, especially when Australia is faced with a crippling balance of trade deficit. Proposed changes to legislation affecting export trade must be viewed under the microscope for possible reactions, adverse or otherwise, from our major trading partners.

In an area where, prima facie, both parties possess sufficient commercial knowledge and experience is it necessary for world wide governmental involvement and regulation? The need for legislative regulation of risk allocation is evident after realising the inherent power of the shipowners and carriers over the shippers as most contracts of carriage favour the carriers.

1 Sweeney JC, 'UNCITRAL and the Hamburg Rules' *Journal of Maritime Law and Commerce* (1991) Vol 22 No 3 511 at 512.

2 The ship owning interests are the operators, carriers, charterers, the P & I Clubs and the Hull Insurers.

3 The cargo owning interests are seller/shipper, buyer/consignee, and cargo insurers.

4 In the 1680's, Lloyds Coffeeshop was a meeting place where ship owners and merchants could organise all-purpose marine insurance policies to cover their risks, after much one-sided negotiation favouring the carriers: above n 1 at 513.

The contract for the carriage of goods by sea is generally evidenced by the charterparty or a bill of lading. At common law parties to the bill of lading (or a charterparty) were completely free to negotiate their own terms, while the carrier had an absolute duty to provide a seaworthy vessel at the commencement of the voyage and was liable for any loss or damage of the goods while in his possession.⁵ This led to shipowners and carriers, in their inherently strong positions, contracting out of this liability. It was the abuse of this unequal bargaining power by the carrier interests that eventually led to the formation of *The Hague Rules* of 1924.⁶

The purpose of *The Hague Rules* was the protection they offered to the cargo owners from the carriers/shipowners excluding themselves from all liability for loss or damage of the sea-borne cargo. This was achieved by incorporating standard clauses into the bill of lading that defined the actual risks the carrier must accept liability for, and listed exceptions to liability that the carrier could claim as a defence. Once a nation adopted the rules, neither party was able to contract out of the effect of the provisions on risk allocation.⁷ Many nations, especially the developing countries, believed the *Hague*, and later *Hague-Visby Rules*, were out of date, out of touch with technology, and favoured the powerful shipowning nations. As a result, the *Hamburg Rules* were introduced in 1978 mainly because extensive involvement and concern from the United Nations to create a more equitable set of rules to govern the carriage of goods by sea.

The Hamburg Rules of 1978

Australia incorporated the *Hamburg Rules* into its current *Sea Carriage of Goods Act 1991*, and upon their proclamation, they will replace the *Hague-Visby Rules*. New Zealand is currently favouring similar legislation to incorporate the *Hamburg Rules* into their law with the operation of the rules suspended, until such time as they receive widespread acceptance.⁸ It is necessary to be aware of the development of and comment on the *Hamburg Rules* to determine if Australia or New Zealand should adopt them over the *Hague-Visby Rules*.

5 Common law exceptions to this liability where if the damage or loss was caused by an Act of God, or by the King's enemies, or by a defect in the goods themselves, or by voluntary sacrifice for general safety: Carver, *Carriage by Sea* 13 ed Vol 1 Para 20.

6 Wilson JF, *Carriage of Goods by Sea* (1988) The Bath Press 165, para 1.

7 *The Hague Rules* 1924, Article 3 Rule 8.

8 The New Zealand government, after reviewing their maritime policies in the 1992 Maritime Discussion Paper, seems certain to follow those proposals and amend their *Sea Carriage of Goods Act* 1940, which incorporates the *Hague Rules*, to include the 1968 *Hague-Visby Rules* and the Special Drawing Rights Protocol. The Discussion Paper made particular mention of the inadequate monetary limits of the *Hague Rules*, being about NZ\$200 per shipping unit/package, to be replaced by the limit of approximately NZ\$1550 per shipping unit/package under the proposed amendments. These proposals have been supported by the shipping industry as New Zealand, like Australia, is predominantly a shipper nation. (January 1992, *Maritime Discussion Paper*, prepared by the New Zealand Transport Department at 79-82).

Shortly after the Comité Maritime International (CMI) completed the Visby Amendments in 1968, the United Nations (the UN) had visions of unified shipping law and extended its operations into the merchant shipping arena. There were four main problems associated with international trade law that helped prompt the UN into forming UNCITRAL⁹ which are:¹⁰

- (i) Out of all the international formulating bodies none had world wide acceptance nor a balance of underdeveloped and developed countries, free-enterprise and state planned economies.
- (ii) Any progress to date had been slow and cumbersome compared to the amount of time and effort devoted in harmonising this area of law. This has resulted from difficulties in national legislation and the inability to link the formulating bodies together.
- (iii) Developing countries have a great need for international trade law as a means to meet the industrialised nations on similar legal footing.
- (iv) The formulating agencies were uncoordinated, combined with a large lack of co-operation resulting in much duplication.

The situation could be best summarised as:

[t]he path of progress is littered with wrecks of conventions and model laws which have never been adopted, and those that have been adopted have been accepted by only a relative small percentage of the nations of the world.¹¹

Arguably a cynical view, but one that is particularly true of the confusion and ratification history of maritime conventions up to the present day.

It is interesting to note the make up of the UNCITRAL Commission,¹² as the UN has tried to motivate the interest of, and participation by, developing

9 United Nations Commission on International Trade Law (UNCITRAL). The United Nations General Assembly adopted Resolution 2205/XXI which set up the UNCITRAL on 17th December 1966. The Commission was to promote greater acceptance of international trade law, terms and customs: Osmanczyk, *The Encyclopedia of The United Nations and International Relations* (1990) Taylor and Francis, New York at 911.

10 Extracted from a paper presented by Prof Schmitthoff 'World Peace Through Law Conferences', Geneva, in July 1967.

11 Ibid.

12 The Commission is made up of delegates from over 36 States. They are appointed by the General Assembly for a duration of 6 years. There are 7 from Africa, 5 from Asia, 4 from Eastern Europe, 5 from Latin America and 8 from Western European and other states. The qualification needed by each representative is that they are a person of prominence in the area of international trade law: Osmanczyk above n 9 at 911.

countries in the future development of international trade law.¹³ This is probably due to the developing countries being very wary and hesitant to use rules primarily drafted by the powerful colonial shipowning nations. One area where the Commission decided to focus its energies was International Maritime Legislation for Merchant Vessels. Following six sessions, from 1972 to 1975, the UNCITRAL Draft Convention on Carriage of Goods by Sea was prepared.¹⁴ The Committee considered the question whether to construct a totally new convention or whether to draft an amendment similar in format to that of another Protocol to the Hague Rules of 1924.¹⁵ The decision was to create an entirely new Convention which was to be titled the 'United Nations Convention on the Carriage of Goods by Sea' (*The Hamburg Rules*).

The *Hamburg Rules* were adopted by a final vote at midnight on 30th March 1978. Article 30(1) provides for the rules to come into force one year after the twentieth ratification is received.¹⁷ Political pressure which motivated the change was largely due to the fact that the '*Hague Rules* were seen by many of the developing nations as a relic of the colonial era and were therefore regarded sometimes as being unfairly supportive of historic maritime powers'.¹⁸ Together with the massive increase in technology since 1924 in the shipping industry, the *Hague Rules* were in need of an update far more reaching than the *Hague-Visby* amendments. Has this been achieved by the *Hamburg Rules*?

Comparison of the Hague-Visby Rules and The Hamburg Rules.

The first question that requires attention is: why did the *Hamburg Rules* take over thirteen years before international ratification?¹⁹ In all fairness, one has to compare the time it took for the *Hague Rules* to become internationally enforceable. The *Hague Rules* of 1924 were to come into force one year after the ratification by four States, which occurred in 1931, seven years after the Hague Convention. It could be argued that if the *Hague Rules* required twenty States (rather than four) to ratify the Convention as did the *Hamburg Rules* then they too could have taken over thirteen years before they gained international acceptance. This presents obvious grounds for academic debate,

13 An example of success within this approach, is in the universal acceptance of the UNCITRAL Arbitration Rules, and later, the acceptance of the Model Law for arbitration.

14 Sweeney above n 1 at 523.

15 In these debates reference was made to the Warsaw Convention which had been complicated by the addition of four protocols.

16 *The Hamburg Rules*.

17 There was no mention of a time limit for ratification, or tonnage of the particular ratifying nations merchant fleet, nor the amount of international trade.

18 *P & I International* Lloyd's of London Press October 1987 at 12.

19 Calculated as from the date of adoption of the Hamburg Rules, at the Hamburg Convention on the 30th of March, 1978 until the twentieth signature ratifying the rules was received on the 7th October 1991.

but any comparison here must be made with the knowledge of the differing requirements for ratification between the two sets of rules. With most international conventions there seems to be an inevitable delay from the date of adoption at the conference to the actual date of international acceptance.²⁰

The Australian *Carriage of Goods by Sea Act 1991* (COGSA), incorporating the *Hague-Visby Rules*, applies to contracts of carriage evidenced by a bill of lading 'or any similar document of title'.²¹ However a receipt as a document of title will not be sufficient to trigger the *Hague-Visby Rules* unless it has the character of a bill of lading.²² The *Hamburg Rules* have a wider application as they apply to sea carriage regulated by 'any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another.'²³

There is no mention of documents of title. This should simplify the often contentious question as to the qualification of the documents relating to a pending dispute under the *Hague-Visby* regime. Even where there is no bill of lading the *Hamburg Rules*, unlike the *Hague-Visby Rules*, are able to apply as all they require is a contract of carriage. Under Article 2.3 the *Hamburg Rules* are expressly withdrawn from application to charterparties, or to a bill of lading issued directly to a charterer. Consequently the *Hamburg Rules* enjoy wide application. In Australia, inter-state and exported sea-borne cargo are covered by the *Hague-Visby Rules*,²⁴ while the *Hague Rules* have similar application in New Zealand. This is in contrast to the scope of the *Hamburg Rules*²⁵ which apply to outbound, as well as inbound cargo.²⁶

The *Hamburg Rules* were drafted for wider application than the existing *Hague-Visby Rules*. Did this concept extend to the definition of 'goods'? Under both sets of rules, 'goods' are widely defined. The *COGSA* expressly excludes live animals and deck cargo²⁷ from being 'goods' under the *Hague-Visby Rules*. One change in respect to the definition of 'goods' is probably tailor-made for New Zealand and Australia. The *Hamburg Rules* define 'goods' as including live animals,²⁸ which is beneficial to both countries which have recently developed a major export in live sheep trade with

20 Another example being UNCITRAL's introduction of the Model Law as a structure for International Arbitration and the extended time that most participating and supportive nations took for their countries to adopt the Rules through domestic legislation.

21 Article 1 (b) *Hague-Visby Rules*.

22 *Hugh Mack & Co Ltd v Burns & Laird Lines Ltd*. (1944) 77 Ll L Rep 377.

23 Article 1.6 the *Hamburg Rules*.

24 Note that s 10(2) *COGSA* excludes the rules applying to carriage of goods between ports within the same state.

25 Article 2.

26 The rules do not apply to domestic carriage unless they are expressly incorporated into the contract of carriage. In the USA the *Hague Rules* apply to inbound as well as outbound cargo via statute.

27 Relates to deck cargo that is, under the contract of carriage, stated as being carried on the deck and is so carried: Article 1 (c) *COGSA Hague-Visby Rules*.

28 Article 1.5.

nations in the Middle East.

Interpretation under the *Hamburg Rules* of 'deck cargo' has arguably been left to the courts. Article 9.1 prohibits the rules from applying to deck cargo but then allows exceptions if there is an agreement with the shipper, or it is the usage of a particular trade, or it is required by statutory rules or regulations.' Article 9.2 establishes that the 'agreement' must be in the appropriate clause or statement in the bill of lading or on the contract of carriage.

The main problem is with the exception of 'usage'. Since the term 'usage in the trade' is not defined, it is one area that will have to be clarified by the courts in resulting litigation. It would appear a straight forward task to nominate the sorts of cargo and containers that are acceptable in the trade for deck cargo. It is puzzling why the Hamburg Convention, when attempting to unify and clarify the risk allocation of carriage of goods by sea, would resort to vague terms such as 'usage' without addressing this issue thoroughly. Overall the Hamburg Rules have expanded on the right to carry deck cargo.

Provisions which determine who is the 'actual carrier' are clearer in the *Hamburg Rules* than in the current *Hague-Visby Rules*. The *Hamburg Rules* make the initial carrier, who is a party under the contract of carriage, responsible for the whole carriage even if it was performed by another subsequent carrier.²⁹ This was designed to alleviate the problems that a shipper faced in determining the party liable for damages where there were numerous carriers, owners and charterers involved in the carriage of goods.

Obviously the carriers objected to this provision but took solace in the fact that under Article 11 if any on-carrier was named in the bill of lading and the damage occurred when the second carrier had responsibility of the goods, the first mentioned carrier was exempt from liability. The carriers argued that they are not always in a position to state the on-carrier on the bill of lading in time to notify the shipper.³⁰ Neither provision stops the initial carrier, as defendant in an action for loss or damage to cargo, joining the other carriers involved as co-defendants or as third parties to the action. Although expensive, it would allow the courts to apportion fault. Once the 'actual carrier' is determined, it is necessary to consider during which stages of the carriage the carrier is exposed to liability.

The *Hague-Visby Rules* apply from 'tackle to tackle', that is when the goods are physically aboard the carrier's vessel, whereas the *Hamburg Rules* extend the liability of the carrier to the entire period he is in charge of the goods.³¹ This is defined as 'being from the time the goods are received from

29 Article 10.

30 Tetley, 'The Hamburg Rules - A Commentary' [1979] *Lloyd's Maritime and Commercial Law Quarterly* 1 at 8-11.

31 Article 4.1.

the shipper or responsible third party, until the goods have been delivered to the consignee or responsible third party'.³² This extension of liability with which the carrier is faced under the *Hamburg Rules* not only codifies, but expands, the common law position that extended the *Hague-Visby Rules* to apply to goods under a bill of lading for an entire voyage. This entails the goods being covered while at dock and while being transferred to another vessel during part of the original voyage.³³

An example of this application is in the case of *The 'Bunga Teratsai'*³⁴ where a container of prawns was stolen after it was discharged from the vessel onto a wharf in Sydney. The carrier's liability under the *Hague Rules* had ceased once the container was discharged from the vessel. Article 1 of these rules made the carrier liable from the time the goods were loaded to the time the goods were discharged, which permitted the carrier to rely on this exclusion as a successful defence. If similar facts arose under the *Hamburg Rules* then the decision would possibly be reversed for the carrier is liable for the loss of the goods until they are delivered to the consignee in accordance with the contract of carriage.³⁵

The carrier, when not able to deliver the goods to the consignee, is able to 'place them at the disposal of the consignee in accordance with the contract, or with the law, or with the usage of the particular trade applicable at the port of discharge.'³⁶ An attempt to define 'usage of the particular trade' is another area of potential litigation. The ideals of the Hamburg Convention for uniform rules are diluted by allowing vastly differing local laws such a large scope for possible application at loading and discharge of the goods.

Probably the most fundamental change envisaged by the *Hamburg Rules* is in determining the general liability of the carrier. Under Article 3 of the *Hague-Visby Rules* the carrier has to 'exercise due diligence' at the beginning of the voyage to make the vessel seaworthy. In effect Article 5.1 of the *Hamburg Rules* extends this requirement of 'seaworthiness' to the entire voyage which, in light of modern technology and commercial reality, is a reasonable change. The basis of liability under the *Hamburg Rules* is Art, 5.1³⁷ which clearly establishes a single test for carrier liability:

32 Summary of Article 4 from *Australian Marine Cargo Liability: A Discussion Paper*, Department of Transport and Communication. (September 1987).

33 *Captain v Far Eastern Steamship Co* [1979] 1 Lloyd's Rep 595 at 602: 'the *Hague Rules* did not apply as the goods stored on the dock and because it does not relate to the carriage of goods by water.' This was distinguished in *Mayhew v OCL* [1984] 1 Lloyd's Rep 317 where the goods were covered by the *Hague-Visby Rules* for the entire voyage including transfers. This case was followed by the High Court in Hong Kong in *The Anders Maersk* [1986] 1 Lloyd's Rep 483.

34 *Nissho Iwai Ltd v Malaysian International Shipping Corp* unreported NSW Supreme Court February 1987.

35 Article 4.2(b)(ii) *Hamburg Rules*.

36 Article 4.2(b)(ii) *Hamburg Rules*.

37 Any attempt to reduce the carrier's liability to less than the standard under this convention is prohibited by Article 23.1.

The carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined..., 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.³⁸

This basis of liability brings the *Hamburg Rules* into line with the evolving trend established in other transport conventions towards carrier liability based on negligence. The burden of proof rests with the carrier to establish that he took all reasonable care to avoid the loss or that it was due to circumstances beyond his control such as 'an act of God'.³⁹

The actual 'list' of defences available to the carrier under Article 4 (2) of the *Hague-Visby Rules* is discarded in the *Hamburg Rules*. Although the English courts in particular have restricted the attempts of the carrier's indiscriminate use of these defences, the loss of the defences of negligent navigation, or negligent management of the ship⁴⁰ under the *Hamburg Rules* will be the ones most sorely missed by the carriers. The defences are an archaic principle found in no other law of transport.⁴¹ The other defences under the *Hague-Visby Rules* still exist but are contained in the 'single sentence' test for liability in Article 5.1 of the *Hamburg Rules* as quoted above.

This was one area where the lobby groups of shippers and carriers partially agreed with each other that the reforms would increase litigation. Under the *Hague-Visby Rules* a majority of claims are settled without litigation as each party to the dispute can justify their position with reference to one of the defence provisions in Article 4 without the need to refer to negligence.⁴² One view is that under the *Hamburg Rules*, such disputes, except for the obvious cases, will involve litigation to determine if the carrier was negligent by not taking all measures reasonably necessary to avoid the occurrence and its consequences. It was argued by the carriers, that under this 'new' burden of proof, fifty years of litigation dealing with the cause and effect on cargo damage would now be re-litigated.⁴³

One obvious exception to the above progressive changes to the *Hague-Visby Rules* is Article 5.4 of the *Hamburg Rules* dealing with the defence of

38 This test established in the *Hamburg Rules* is similar to the one in the Warsaw Convention of 1929, which provided that all 'necessary' steps be taken by the carrier. This was later judicially interpreted as being 'reasonably necessary' in *Grein v Imperial Airways Ltd* [1937] 1 KB 50.

39 The carrier also has the burden of proof if a third party is cause of loss or damage of cargo, eg another vessel collides due to negligence of other master: Article 5.7

40 Article 4 (2) (a) *Hague-Visby Rules*.

41 The defence of negligent navigation or mismanagement of the vessel, began during 1882-1889 as a request from insurance firms.

42 'COGSA, Hague-Visby and Hamburg' [1984] vol 15 no 2 *Journal of Maritime Law and Commerce* 233 at 244.

43 Sweeney above n 1 at 531 and Yancey, 'Hague, COGSA, Visby and Hamburg', (1983) 57 *Tul L Rev* 1238.

fire which arguably favours the carrier. Under the *Hague-Visby Rules* the carrier had to establish that he had used due diligence in making the vessel seaworthy prior to his invoking the exception of fire.⁴⁴ The burden of proof as established in the new standard of carrier liability however is reversed. Instead of the carrier having to prove that '...he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences,'⁴⁵ the shipper, who does not have the evidence, has the burden of proof. Article 5.4 provides that the carrier is only liable for the loss of, or damage caused to, goods or delay in their delivery caused by fire if the claimant proves that the fire arose from the fault or neglect of the carrier or his servants or agents. There seems no logical reason why the defence of fire was treated differently by the convention.

Article 5.4 (b) allows the claimant to carry out a 'survey' into the cause and handling of the fire in the preparation of his case against the carrier. The type of survey to be used is described as being 'in accordance with shipping practices' which is another qualification that could well be open to abuse and resulting litigation.⁴⁶

The *Hamburg Rules* distinguish between damage and loss from delay liability for damage and loss caused by negligence. Damages for delay, often extremely difficult to establish, are recoverable under the *Hague-Visby Rules*. They were treated in a similar fashion to claims for damages, that is the plaintiff had the burden to establish that the loss was direct and foreseeable.⁴⁷ Under the *Hamburg Rules*, unless the carrier takes 'all measures that could reasonably be required to avoid' the delay, he would be liable for damages.⁴⁸ This leads the question as to how the *Hamburg Rules* determine what is a 'delay' and how to determine 'damages'.

First, 'delay' under Article 5.2 occurs if the 'goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon'. If no time was agreed upon, then the relevant time period is the time in which it would be reasonable to require a diligent carrier to complete the contract. If the goods are not delivered within 60 days after the expiry time on the contract of carriage then the goods are deemed to be lost.⁴⁹

Secondly, under the *Hague-Visby Rules*, there was no limit on the damages recoverable for delay so long as they were not too remote under principles of the common law. At first the shippers probably celebrated the

44 Tetley above note 30 at 1.

45 *Hamburg Rules* Article 5.1.

46 As fire regulations in most ports and harbours differ greatly it would be difficult to agree on what is the actual shipping practice.

47 Tetley above n 30 at 1.

48 Article 5.1 *Hamburg Rules*.

49 Article 5.3 *Hamburg Rules* and under Article 19.5 any claim for loss resulting from delay must be made by notice within 60 days from the date the goods were handed over to the consignee.

fact that under the provisions of the *Hamburg Rules* they now had 'delay' as a recognised head of damage. Any such celebrations should have been short lived as the negotiating power of the carriers enabled them to limit this liability for delay.

The *Hamburg Rules* limit liability for delay to 'an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea'.⁵⁰ There were initial industry concerns⁵¹ as to the interpretation of the amount of damage payable if perishable goods had been merely delayed,⁵² or if they had suffered damages as a consequence of delay.⁵³ This does not seem to be an issue as the Rules provide that if both damage and delay occurs, the aggregate liability cannot exceed the liability in respect of damaged goods except as otherwise agreed.⁵⁴ One could be excused for believing initially that this reform favours the shipper but, because of the limitation of damages, it appears to favour the carrier.

Limiting the carrier's liability

The fact that the Hamburg Rules have retained the limitation of the carrier's liability indicates that the rules are not favouring the cargo-owning interests as first described by many commentators. It appears that due to the relatively modest limits of limitation the *Hamburg Rules* could be argued to favour the carriers.⁵⁵ The *Hamburg Rules* have adopted the now familiar basic unit of account, that of the Special Drawing Rights of the International Monetary Fund ('IMF').⁵⁶ The new limits⁵⁷ in the *Hamburg Rules* represent a meagre 25 per cent increase over the 1968 limits and if allowance is made for inflation during this period then the actual limit of liability of the carriers in 'real terms' has fallen. This represents a distinct advantage for the carriers as the limit of 2.5 SDR's for loss or damage to a 'package' represents one of the lowest limits in the world of transportation today.⁵⁸

50 Article 6.1 (b) *Hamburg Rules*.

51 Waldron AJ, *The Hamburg Rules*, [1991] JBL 311.

52 And therefore subject to lower levels of limitations.

53 Therefore subject to higher levels of limitations.

54 Article 6.1 (c) *Hamburg Rules*.

55 Waldron note 51 above at 313.

56 As adopted by the *Hague-Visby Rules* pursuant to the SDR Protocol of 1979, based on a dual system of liability of packaging and weight.

57 Being 835 units of account per shipping unit, and 2.5 units of account per kilogram, which ever is the higher in respect to the damaged goods. Article 6 *Hamburg Rules*. The *Hamburg Rules* clarifies 'package' to be that listed on the bill of lading or relevant document as constituting the number of packages in the container or pallet. If no such number is listed, then the container or pallet shall constitute a single package.

58 A comparison can be made with the CMR, Article 23 where the limitation for loss or damage is set at a realistic 8.33 SDR's per kilogram, plus the costs of carriage.

Australia and New Zealand

Until 1991 Australia's sea-borne cargo was regulated by the *Sea Carriage of Goods Act 1924*, (*SCOGA*) which basically adopted the *Hague Rules of 1924*. The mere passage of time and technical development has led to deficiencies⁵⁹ in this Act. As a result, '...it does not adequately reflect the shipper's interests in the Australian trade in live animals or in containerised cargo. Where liability of the carrier is limited to the blue water leg,⁶⁰ the 1924 *SCOGA* is no longer appropriate for modern, technically advanced shipping and cargo handling procedures.'⁶¹ The Australian Government acted on these concerns and after consulting the shipping industry released a discussion paper addressing the relevant issues.⁶²

The *Carriage of Goods by Sea Act 1991*⁶³ (*COGSA*) incorporated changes that were designed to bring marine cargo liability into line with other similar arrangements in other modes of transport and update marine cargo liability in Australia to international standards.⁶⁴ As well as replacing the 1924 Act, it includes two major changes. First, it includes provisions that give effect to the *Hague Rules* as amended by the Visby (1968) and Special Drawing Rights⁶⁵ (1979) Protocols.⁶⁶ These amendments do not change the balance of liability between the shippers and carriers as previously established by the 1924 Act.

Secondly, the *COGSA 1991* include appropriate provisions⁶⁷ to allow the

59 For example, the upper limits on liability are still those as stated in 1924. Namely, £100 'or equivalent of that sum in other currencies per package or unit. This concept includes containers as a single unit, thus if a container is lost or damaged then the limit of liability the carrier is exposed to is \$A200.00. The shippers believed this inadequacy encouraged the shipowners not to take sufficient care of the cargo.

60 From 'tackle to tackle' - an expression frequently used to describe the period of exposure to liability of the carrier.

61 *Australian Marine Cargo Liability; a Discussion Paper*, Department of Transport and Communications, September 1988 at 2.

62 The Department of Transport and Communication distributed a report; *Australian Marine Cargo Liability; a Discussion Paper* (1988) 159 Parliamentary Debates (H of R) at 980. It was not until after reviewing this report that the Government was prepared to commit to any possible adoption of the *Hamburg Rules*: per Mr Peter Morris Minister of Transport.

63 Number 160 of 1991; assented to on 31 October 1991 - Part 3 and Schedule 2 come into operation on proclamation, being a day not sooner than the day on which the Hamburg Convention comes into force internationally.

64 Explanatory Memorandum, Carriage of Goods by Sea Bill 1990.

65 Known as SDR Protocol.

66 The *Hague Rules* of 1924 limit the liability at £100 gold per unit for loss or damage to cargo. This reference to gold was not able to cope equitably with the effects of world wide inflation. The question remained to determine the extent of liability and the amount of exposure the shipper has to insure against. The effect of these amendments, as previously discussed, is that they increase the liability limits placed on the shipowners, they replace the 'gold standard' with the International Monetary Fund (IMF) currency unit, and clarify the meaning of 'package or unit' to enable the limit of liability provisions to allow for the use of containers.

67 *COGSA 1991*, s 2(2) '...able to be fixed by proclamation, being a day not sooner than the day on which the Hamburg Convention enters into force in respect of Australia'.

Hague-Visby and SDR Protocol regulations to be replaced by the *Hamburg Rules*. This means the carriers are to have 'substantially more liability for loss or damage to cargo in their charge'. The reason for including such provisions are:⁶⁸

As at the date of this Bill the *Hamburg Rules* had not received the international support required to make them a viable alternative.

At the date of this Bill only 17 of the required 20 contracting states have adopted the *Hamburg Rules*.

At the date of this Bill none of Australia's major trading partners have adopted the *Hamburg Rules*.

This allows a future government the discretion whether to adopt these rules after consideration of the acceptance of these rules internationally.

It gives a strong signal to our current and future trading partners that may be themselves considering the adoption of the *Hamburg Rules*, that Australia supports these rules as an acceptable international cargo liability regime.

If by the 31 October 1994⁶⁹ the *Hamburg Rules* have not been proclaimed to commence, then there is a provision that automatically incorporates them into force in Australia, (unless Parliament otherwise decides) in place of the current amended *Hague Rules*. This 'trigger' will not be necessary if the *Hamburg Rules* are proclaimed to commence in place of the current *Hague-Visby Rules* prior to the 31 October 1994.

Faced with the options of incorporating the *Hague-Visby Rules* or the *Hamburg Rules* into the *Sea Carriage of Goods Act 1940* New Zealand seems certain to follow the two stage process adopted by Australia. They propose to incorporate both sets of rules with the *Hamburg Rules* being suspended until they have widespread acceptance. New Zealand recognises the importance of adopting similar legislation to that of Australia as New Zealand's largest bilateral trade flow is with Australia and also because of the continuing efforts being made to harmonise law affecting trans-Tasman business.⁷⁰

As a consequence of Australia and New Zealand being shipper nations,⁷¹ it could be argued they base their decision of whether to adopt the *Hamburg*

68 From Explanatory Memorandum, Carriage of Goods by Sea Bill 1990.

69 Section 2 (3): 'after three years from date of Royal Assent of this Act', thus 31 October, 1994. Note that appropriate provisions are in place to enable the *Hamburg Rules* to be repealed: s 2 (3)(a); or even a further period of three years can run before proclamation or repeal: s 2 (3)(b). Prior to any proclamation the Minister must consult with, and give consideration to the views of, shippers, carriers and shipowners: s 2(6).

70 New Zealand Transport Department January 1992 *Maritime Discussion Paper* at 82.

71 'Australia remains essentially a shipper nation' from second reading of the Australian *Sea Carriage of Goods Bill 1991*. And '...a predominantly shipper country like New Zealand' above note 70.

Rules solely on the responses of our major trading partners.⁷² By incorporating the *Hamburg Rules* Australia and New Zealand will be signalling to the other nations our support for these rules and the desire to position our exporters on a level footing with modern international standards once they are operative.⁷³ As of the 7 October 1991, the required number of states have ratified the *Hamburg Rules*, and pursuant to Article 30 (1), they come into force on the 1st November, 1992. The ratifying nations were:-

Barbados, Botswana, Burkina Faso (formerly Upper Volta), Chile, Egypt, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Tunisia, Uganda, Tanzania, and Zambia.

As one can see from these signatory nations, the majority are under-developed countries and are not among Australia's or New Zealand's major trading partners.⁷⁴ The Australian Government 'will not be moving to implement the *Hamburg Rules* until it is in the commercial interests of Australia to do so...and a sufficient number of our major trading partners have adopted, or expressed an intention to adopt, the *Hamburg Rules*.'⁷⁵ The New Zealand proposal has a similar approach. If the *Hamburg Rules* are to be included as amendments to the current New Zealand legislation, then they must receive 'widespread acceptance amongst our principle trading partners' before they are adopted.⁷⁷

Japan, USA and the European Economic Community (EEC)⁷⁸ are clearly the major trading partners of both Australia and New Zealand.⁷⁹ It is imperative for both nations when determining the date to adopt the *Hamburg Rules*, to contemplate our trading partners' attitudes towards sea-borne cargo liability. Japan being strong shipowning and carrier nation has no intention of adopting the *Hamburg Rules* at this stage. Their internal workings of the *Hague-Visby Rules* have reached a point of compensation that seems to satisfy both carrier and shipper interests.

72 This view was expressed in the Explanatory Memorandum for the Carriage of Goods by Sea Bill, 1990. It was intended that future Governments would have the discretion to adopt the *Hamburg Rules* after considering the level of international acceptance.

73 'Exporters to Benefit from Changes to Australia's Marine Cargo Liability Legislation' 1988, September Vol P & I International at 10.

74 It is interesting to point out that if the twenty ratifications required had to satisfy a pre-determined amount as to tonnage of that nation's merchant fleet or volume of international trade, then this list would probably be missing most of its current signatories as they would not qualify.

75 Castles I, *Australian Statistician No 74* Australian Bureau of Statistics Canberra 1991 582-584, and 703-704; *The Far East and Australasia* - 1992 (23rd ed) Europa Publications Limited at 664-666.

76 Second Reading speech by the Australian Minister for Transport, Carriage of Goods by Sea Bill 1991.

77 Above note 70.

78 The EEC being Belgium(Luxembourg), Denmark, France, Germany, Greece, Ireland, Italy, Netherlands, Portugal, Spain and the United Kingdom.

79 Above n 75.

The USA adopts the *Hague Rules* under their *Carriage of Goods by Sea Act*. They have not ratified the Visby Amendments, nor does it seem likely that they will.⁸⁰ Shipper interests will lobby for incorporation of the *Hamburg Rules*, but it is likely that the courts will apply the *Hamburg Rules*, as they have the Visby Amendments, under choice of law provisions. It is entirely possible that the *Hamburg Rules* will never be ratified by the USA.⁸¹

The EEC countries have differing views with the end result being, a wait and see approach. This was the view of Germany,⁸² while France, through domestic legislation in 1981, implemented the *Hamburg Rules*. They withheld ratification pending the adoption of the rules by other EEC countries. The UK, with their strong carrier interests, has no immediate intention of adopting the *Hamburg Rules* and will 'only ratify the rules when they are dragged kicking to the signing table.'⁸³ The Scandinavians, while not adopting the rules, are planing to enact parallel legislation which will enable their courts to decide any matters arising from the *Hamburg Rules*.⁸⁴ This appears to be the 'middle of the road' approach which may prove popular with other non-adopting nations in an attempt to have some control over the ensuring *Hamburg Rules* litigation.⁸⁵

The *Hamburg Rules* represent a considerable advance over the *Hague-Visby Rules* in a number of areas. The actual carrier, with whom liability rests, is clearly defined.⁸⁶ Although the *Hamburg Rules*, (applying to inward and outward bound cargo) have a wider application than the *Hague-Visby Rules*, the appropriate provisions are clear and precise.⁸⁷ The list of carrier defences in the *Hague-Visby Rules*, in particular the archaic defences of 'error in navigation' and 'negligent management', are replaced by a single test for liability.⁸⁸ The *Hamburg Rules* are not restricted, as the *Hague-Visby Rules* are, to the 'paper' bill of lading. Modern commerce demands paperless exchanges of electronic data and agreements and these will be regulated under the *Hamburg Rules* which apply to all contracts of carriage by sea.⁸⁹

80 Mendelsohn AI, 'Why the US Did Not Ratify the Visby Amendments', (1992) Vol 23 No 1 *Journal of Maritime Law and Commerce* at 29.

81 Ibid.

82 Possibly a sympathetic view as hosts of the Hamburg Convention in 1978.

83 The view expressed in correspondence by the author with the Institute of Maritime Law, University of Southampton, England 20 October 1992.

84 An example of this is where Copenhagen trades with Nigeria (a signatory Nation adopting the *Hamburg Rules*), but the *Hamburg Rules* will not apply to other carriages such as Copenhagen to London: from correspondence with the Institute of Maritime Law, University of Southampton, England 20 October 1992.

85 Possibly as a result of a growing concern about the 'free' use of the *Hamburg Rules*, Lloyd's of London published a warning on the *Lloyd's List* 22 September 1992, that any carrier agreeing to carry under the *Hamburg Rules* cargo from a nation that does not adopt the *Hamburg Rules*, will prejudice any insurance claims.

86 Articles 1(2), 10 and 15 (1) (c) *Hamburg Rules*.

87 Articles 2(1) (2) and (3) *Hamburg Rules*.

88 Article 5(1) - Responsibility of the Carrier, *Hamburg Rules*.

89 Sweeney note 1 above at 537.

Overall the *Hamburg Rules* represent a more commercially acceptable and equitable regime for the carriage of goods by sea which is evident in the extension of liability of the carrier for delay⁹⁰ and the stipulation that the first carrier is liable for the complete carriage, unless stated otherwise on the bill of lading.⁹¹ Even though these areas represent improvements over the *Hague-Visby Rules* other areas fall short of the 'mark', including provisions that are vague and uncertain as to their intended interpretation.⁹² Although the *Hamburg Rules* succeed in clarifying the interpretation of 'package',⁹³ the adoption of the Visby Protocol and the SDR for calculating the limitation of liability fails to bring the rules in line with current world trends in other areas of transportation. It appears that notwithstanding the claims that the *Hamburg Rules* favour the shipper by increasing the carriers liability, the carriers actual liability has been reduced.⁹⁴

As the *Hamburg Rules* fast approach the date of enforcement,⁹⁵ the debate over their adoption in Australia and New Zealand will intensify. If the past few years are a guide, then the debate will probably incorrectly centre on the historical battle between the interests of the carriers and that of the shippers. The world arena of conventions, dealing with the risk allocation of sea-borne cargo had desperately attempted at unification. Currently some nations are regulated by the *Hague Rules*, others are under the *Hague-Visby Rules*, while some nations operate under these rules with their own significant changes.⁹⁶ Shortly another twenty ratifying nations will presumably be operating under the *Hamburg Rules*. In nearly a century⁹⁷ of conferences, codes, regulations, United Nations intervention and two world wars, the rules governing risk allocation of sea-borne cargo are no closer to uniformity.

It appears that the shipping industry as a whole has lost sight of the reasons and intentions of the original conferences in the early 1920's which helped formulate the *Hague Rules*.⁹⁸ One would be excused in thinking that

90 Articles 5(2), (3) and 6(1)(b), *Hamburg Rules*.

91 Articles 10 and 11(1), *Hamburg Rules*.

92 Examples of these are terms such as 'usage' found in Article 4(2) (b) (ii) *Hamburg Rules* and unnecessary definitions, Article 1(3) and using 'inter alia' instead of using 'telegram, computer printouts, telephoto transmissions, and telex etc' as examples of a 'writing' in Article 1(8) *Hamburg Rules*: Tetley above note 47.

93 Article 6, *Hamburg Rules*.

94 The minor change in liability, if any, could be the reason that the carrier nations with two exceptions voted for the Rules at Hamburg: Tetley above note 47.

95 1st November, 1992.

96 For example USA which, through domestic legislation, has changed the application of the *Hague-Visby Rules* to include incoming as well as outgoing cargo.

97 Since the American *Harter Act* of 1893.

98 In 1920 the Imperial Shipping Committee recommended uniform legislation throughout the British Empire. In 1921 the International Law Association met at the Hague and formulated a voluntary set of rules known as the '*Hague Rules*' and recommended them for international adoption. The Diplomatic Conference on Maritime Law in Brussels in 1922 appointed a committee to draft amendments to *Hague Rules*. 'The International Convention for Unification of Certain Rules of Law Relating to Bills of Lading' was passed and became known as the *Hague Rules* of 1924.

the current situation is in a similar state of confusion to that prior to the introduction of the *Hague Rules* back in 1924. Does this set the stage for the adoption of a new set of modern rules? The later conventions have been concentrating on an equitable set of rules of risk allocation that will satisfy both the shippers and the carriers.⁹⁹ As history has proven, this is an impossible task. The carrier nations, due to their inherent power, are always going to be in the stronger position to negotiate risk allocation rules:

‘Those who control the world’s largest market get to write the rules. That is as it always has been’.¹⁰⁰

Any introduction of a new regime that significantly favours either side will certainly have a limited life. The original *Hague Rules* were aimed at world uniformity, restricting the carriers from contracting out of their obligations and imposing limited liability for a number of defined cases of loss, or damage to cargo. The later *Hamburg Rules* are aimed at the same goal, with one major difference being a change in the method of determining liability. The unfortunate side effect of the continual attempts to upgrade the sea-carriage rules, to compensate for changes in technology, world inflation, and the previously neglected developing shipper nations, has wound the ‘world uniformity clock’ back 100 years.

Conclusion

In a competitive world with many countries striving to pull themselves out of recession, a country with differing and out of favour sea-borne cargo liability rules from the major trading nations, could be quickly overlooked as an exporter for a nation that had similar regulations to the importing country. Will the major players in world trade continue to block and hinder the adoption of the *Hamburg Rules*? There is a view that Europe, not Japan or the USA, will emerge as the defining player in the changing world economic order. This is based on the assumption that it will be the first region to form a super-economy.¹⁰¹ This could have the effect of accelerating the acceptance of the *Hamburg Rules*, as many countries in Europe have strong cargo interests and would favour the more equitable *Hamburg Rules*. It will be interesting to see if this prediction unfolds.

The first option is to do nothing and preserve the status quo.¹⁰² The majority of Australia’s and New Zealand’s major trading partners have not

99 In 1969 the UNCTAD Shipping Committee commenced an appraisal of international shipping legislation and the *Hague Rules*. In 1978, The *Hamburg Rules* were finalised (Officially known as ‘United Nations Convention on the Carriage of Goods by Sea, 1978’).

100 Thurow L, ‘Head to Head; The Coming Economic Battles Among Japan, Europe and America’, *Australian Business Monthly*, April 1992 at 62-66.

101 *Ibid* at 66.

102 That is until the automatic adoption of the *Hamburg Rules* on 31 October 1994: s 2(3) COGSA unless Parliament decides to repeal their adoption after consulting the industry: s 2(6).

shown any immediate intention to adopt the *Hamburg Rules*. As a result, there is time to take stock and attempt to determine the likely outcome of adopting the rules. At a time when the balance of trade figures are exceptionally poor any tampering with the mechanics of international trade, no matter how small, is of obvious importance. In the present economic climate, Australia and New Zealand can ill afford to be placed at odds with our major trading partners.

Without doubt the *Hamburg Rules* are a considerable advance over the *Hague-Visby Rules*. However, the Parliamentary intention is that they should not be implemented in Australia or New Zealand until they are accepted by our major trading partners.¹⁰³ It could be argued that neither country appears in a position to 'bully' our major trading partners into accepting this new regime by implementing the rules as domestic law. Maybe we should clearly state our preference for the future. This has been accomplished by the inclusion of a 'dormant' set of *Hamburg Rules* in our *COGSA 1991*, and New Zealand's proposal for a similar style of legislation. This reasoning suggests that at this stage of maritime development we must be satisfied to wait for the major players to make the first move; otherwise, it could be argued that we would be disadvantaged with our major trading partners and risk placing more pressure on our export trade as it attempts to correct the international ledger in our favour.

The second option would be the bold approach. Australia and New Zealand could adopt the *Hamburg Rules* into domestic law immediately after they came into force internationally on the 1 November 1992. As shipping nations there is strong argument that their adoption will be in our best commercial interest. If Australia and New Zealand adopted these Rules, it may exert sufficient pressure and encourage other nations which have a 'wait and see' approach to actually adopt them. Once some of the nations with dominate carrier interests switch to the *Hamburg Rules* a domino affect is likely to occur and trigger their proclamation in many nations. The ultimate result being the acceptance of the rules by Japan, the USA and the UK.

Regrettably, one can not lose sight of the fact that at present our major trading partners, namely Japan and the USA, seem intent on not adopting the Rules.¹⁰⁴ It is unlikely that any amount of political debate will change the position of our major trading partners.¹⁰⁵ A proposal for the early adoption of these rules should be approached with caution as it may result in a

103 The view expressed by both Nations by the Second Reading speech by the Australian Minister for Transport, Carriage of Goods by Sea Bill 1991 and 1992 New Zealand Transport *Maritime Discussion Paper* at 82.

104 'In 1991-92 our biggest trading partners were Japan and the USA. More than 20% of our merchandise trade (exports plus imports) was with Japan and 16% was with the USA' *The Bulletin* October 1992 at 28.

105 Demonstrated recently by Australia's strong objections to the USA's trade and sugar agreements with Mexico which have been totally ignored.

commercially damaging decision for Australia and New Zealand.

It is unfortunate that most articles and reports by academics, lawyers, and industry leaders seem to focus on the titanic battle between the shipper and carrier interests, with each writer siding with a particular party. Such a global problem requires global vision before the buoy at the end of the shipping lane can be sighted.

An illustration of the situation is demonstrated by recalling a judgment delivered by the Supreme Court of the United States at the turn of the century on whether goods shipped from the Philippines were taxable as imports under the American Constitution. Each judge in turn rendered his judgment for or against with some judges even dissenting in part and some agreeing in part. Finally a little old man rose at the rear of the courtroom and addressed the bench.

'Please, your Honours', he asked plaintively, 'Do I get me lemons back ?'¹⁰⁶

Unless the majority of the nations adopt the *Hamburg Rules*, they will at best represent a third regime of rules for regulating the carriage of the world's sea-borne cargo.¹⁰⁷ This in itself is in contrast with the concept of uniformity of the law of liability of sea-borne cargo in the international shipping lanes. As this area of maritime law fast approaches the cross-roads, Australia and New Zealand should not be asking: what is the best regime that would favour our country? Instead, taking a global view we should possibly be asking: what is the best for world unification of the law of liability of sea-borne cargo? If this approach is taken then the efforts of the last 100 years towards world unification of this area of law will not be wasted.

106 Tetley above note 30 at 1.

107 The other two being the *Hague Rules* and the *Hague-Visby Rules*.