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Legal Update — Transport Group

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United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea [Rotterdam Rules]

On 23 September 2009 the United Nations body UNCITRAL organised a signing ceremony for the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea in Rotterdam.

I was privileged to attend this ceremony which marked over 19 years of work by the Comite Maritime International (CMI) to bring into existence a Convention which hopefully the majority of trading nations will now ratify and bring greater uniformity to this area of the law. The United States was one of the 16 States who signed the Convention in Rotterdam, leading many commentators to think (and hope) that it will ratify the Convention soon and lead many other countries to do the same.

This is intended as a brief summary of what is an extensive re-write of the law in this area. To justify that statement, I note that the Australian Amended Hague Rules, as contained in Schedule 1 for the Carriage of Goods by Sea Act (1991), comprised ten articles, the Hamburg Rules as contained in Schedule 2 of that Act, comprised 26 articles and the Rotterdam Rules comprise 96 articles. It is a mammoth document for those who are used to dealing with a relatively simple text.

Period of Responsibility of Carrier

Article 12 of the Convention provides that the period of responsibility of the carrier "begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered", extending the Hague Rules "tackle to tackle" regime. It will be appreciated that this instantly brings to the fore a new description which is not found in either of the previous regimes, that of the "performing party" (although Hamburg does refer to an "actual carrier"). Such a person is defined in article 1, paragraph 6, as meaning:

> "a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly at the carrier's request or under the carrier's supervision or control."

That definition goes on to confirm that a "performing party" is not anyone who is retained by a shipper or consignee.

Obligations of Carrier

In so far as the obligations of the carrier are concerned, much of the wording of the Hague Rules, which has of course been the subject of considerable judicial interpretation, has been retained. For example, in article 13, paragraph 1, the carrier, during the period of responsibility under article 12, is required to:

> "properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods."

Pursuant to article 13, paragraph 2, the parties are at liberty to agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper or consignee, but such an agreement is to be referred to in the "contract particulars", which expression is defined in article 1, paragraph 23, as meaning:

> "any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record."

"Transport document" is defined in paragraph 14 of article 1 as meaning:

> "a document issued under a contract of carriage by the carrier that:
>
> a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and
>
> b) Evidences or contains a contract of carriage."

"Contract of carriage" is itself identified in paragraph 1 of article 1 as meaning:

> "a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea (emphasis added) and may provide for carriage by other modes of transport in addition to the sea carriage."

Article 14 contains provisions which are based on the Hague Rules. It provides that:

> "The carrier is bound before, at the beginning of and during the voyage by sea to exercise due diligence to:
>
> a) Make and keep the ship seaworthy
>
> b) Properly crew, equip and supply the ship and make and keep the ship so crewed, equipped, and supplied throughout the voyage; and
>
> c) Make and keep the holds and all other parts of the ship in which the goods are carried, including any containers supplied by the carrier, in or upon which the goods are carried, fit and safe for their reception, carriage and preservation."

Thus the carrier is required to maintain the seaworthiness of the vessel, properly crew, equip, supply the ship and keep the holds fit and safe for the cargo throughout the voyage.

Liability Regime

The basis of the carrier's liability is dealt with in article 17. It is framed in a slightly different fashion to the Hague Rules but much of the language of article 4 in the Hague Rules is reproduced. Paragraph 1 of article 17 is different however. It provides as follows:

> "The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4." (articles 11 to 16)

Paragraph 2 of article 17 is also framed in slightly different language to article 4 Rule 2 of the Hague Rules, which commences with the words "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from…". Paragraph 2 of article 17 reads:

> "The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage or delay is not attributable to its fault or to the fault of any person referred to in article 18".

Paragraph 3 of article 17 provides an alternative source of relief for the carrier. It is paragraph 3 which reproduces in large part the exclusions of liability contained within article 4 Rule 2, the familiar list of exceptions, with the important exception of nautical fault (article 4 Rule 2(a)) of the Hague Rules.

It does however include Act of God, perils of the sea, war, quarantine restrictions or governmental acts, strikes, latent defects not discoverable by due diligence, act or omission of the shipper, wastage in bulk or weight, or any other loss arising from an inherent defect, quality or vice of the goods, insufficiency or defective condition of packing, saving or attempting to save life at sea, reasonable measures to save or to attempt to save property at sea, reasonable measures to avoid or attempt to avoid damage to the environment and acts of the carrier and pursuant to the powers conferred by articles 15 and 16 (they relate to the taking of measures where goods are a danger to persons, property or the environment or sacrificing goods at sea when it is made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure).

In addition, fire has been retained but without the proviso that was in article 4 Rule 2(b) of the Hague Rules "unless caused by the actual fault or privily of the carrier", presumably because of what is contained in paragraph 4 of article 17 which goes on to provide that the carrier remains liable if the claimant proves that the fault of the carrier, or of a person referred to in article 18, caused or contributed to the event or circumstance on which the carrier relies.

Also, in accordance with paragraph 5(a) of article 17, the carrier remains liable if:

"a) The claimant proves that the loss, damage or delay was or was probably caused by or contributed to by:

i) the unseaworthiness of the ship

ii) the improper crewing, equipping and supplying of the ship or

iii) the fact that the holds or other parts of the ship in which the goods are carried (including any containers supplied by the carrier in or upon which the goods are carried) were not fit and safe for reception, carriage and preservation of the goods; and

b) The carrier is unable to prove either that:

i) none of the events or circumstances referred to in subparagraph 5(a) of this article caused the loss, damage or delay; or

ii) it complied with its obligations to exercise due diligence under article 14."

It is also relevant to note that under paragraph 6 of article 17, it is provided that when the carrier is relieved of part of its liability pursuant to this article, it is liable for only that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to the article.

Thus it will be seen that the "ping-pong" effect of the burden of proof is alive and well. (This is described particularly well in the NSW Court of Appeal by Samuels JA in Gamlen Chemical Co. (A/Asia) Pty Limited v Shipping Corporation of India Limited (1978) 2 NSWLR 12, where His Honour said with reference to the judgment of Lord Esher in the Glendarroch (1894) P 226 at 231, where His Lordship, in the words of Samuels JA

"makes it plain that the plaintiffs must first prove the contract and the non-delivery or the delivery in a damaged condition, to which the defendants may plead an exception, leaving it then to the plaintiffs to reply "there are exceptional circumstances, viz. that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiffs to make out that second exception"

It has been well accepted under the Hague Rules that if goods have been damaged during the tackle to tackle period and the consignee/plaintiff tenders a bill of lading and proves the damage, the burden of proof is placed on the carrier to bring itself within one of the exclusions in article 4 rule 2, and thereafter, the consignee/plaintiff may wish to adduce evidence that the carrier is disentitled from relying on any of those provisions by reason of its negligence or failure to exercise due diligence under article 3 to make the ship seaworthy. The same evidentiary burdens would seem to apply under the new Convention.

Paragraph 1 of article 17 seems merely to preserve that position of presumed fault by the carrier, where it is established that the

loss and damage took place during the carrier's period of responsibility. This was explicitly set out in article 5 of the Hamburg Rules. The difference between the Hamburg Rules and article 17 is really the inclusion of the words "if the claimant proves" etc. Hamburg referred simply to: "if the occurrence which caused the loss, damage or delay took place", without specifying who needed to prove it.

Article 18 is headed "Liability of the carrier for other persons". It confirms that the carrier is liable for the breach of its obligations caused by the acts or omissions of any performing party, the master or crew of the ship, employees or agents of the performing party or any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

There are provisions dealing with the liability of "Maritime performing parties", who are separately defined in article 1, paragraph 7. The provisions are contained in article 19.

Delay

Another change from the Hague Rules regime, but not from Australia's modified Hague Rules regime, is the inclusion in article 21 of a definition for "delay" which is somewhat more restrictive than the Hamburg Rules provision. That contained a definition in article 5, paragraph 2, which referred to a time expressly agreed upon or in the absence of such agreement, the time "which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case".

Article 21 of the Convention reads:

> "Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed."

Article 17 expressly provides that the carrier "is liable for loss or damage to the goods, as well as for delay in delivery…", (emphasis added), which is unlike the Hague Rules, which only expressly refers to loss or damage to goods and there are arguments as to whether or not they encompassed loss to a shipper or a consignee brought about by delay. Australia's modified Hague Rules, as well as referring to a time for delivery "allowed in the Contract for that purpose", also says "within a reasonable time for delivery, at that port, of similar goods carried by a diligent carrier (having regard to any particular circumstances of the case and the intentions of the shipper and the carrier)."

Notice of Loss

The provisions dealing with Notice of Loss will not be unfamiliar to those experienced in the current regime. However, the period of three days in article 3 Rule 6 of the Hague Rules for the giving of notice where damage was not apparent at the time of delivery has been extended to seven days under article 23, paragraph 1. Such notice is not

required however, where the loss or damage has been ascertained in a joint inspection of the goods (article 23, paragraph 3). There is a special 21 day period within which notice is required to be given where a claim for loss due to delay is made (article 23, paragraph 4).

Time Bar and Identification of Carrier

Time for suit is covered in article 62, and the current one year period has been extended to two years in paragraph 1. That period may however be extended by the person against whom a claim is made at any time during the running of the period (article 63); and an action for indemnity may be instituted after the expiration of the period, provided it is done within the time allowed by the applicable law in the jurisdiction where proceedings are instituted or within 90 days commencing from the day when the person instituting the action for indemnity has either settled a claim or been served with process in an action against itself earlier (article 64).

There is also a further time provision (article 65) which is related to article 37, which is a new provision. Article 36 specifies what is required to be inserted in a transport document or electronic transport record. Amongst that information is included the "name and address of the carrier" (article 36, paragraph 2(b)).

Article 37 makes ineffective anything else in the transport document which is inconsistent with the identification of the carrier in the contract particulars (paragraph 1). Pursuant to paragraph 2 of article 37, it is provided that if no one is identified as the carrier, as required under article 36, but the contract particulars do identify a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter and it identifies the bareboat charterer and its address, in which case the bareboat charterer is to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address (the same applies to the bare boat charterer). None of the above prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of article 37 is the carrier.

Article 38 requires a transport document to be signed by the carrier or a person acting on its behalf.

Returning to the time limitation provision in article 65 (as related to article 37), it is provided that an action against a bareboat charterer or the person identified as the carrier under article 37, paragraph 2, may be instituted after the expiration of the two year period, provided it is within the later of either the time allowed by the applicable law in the jurisdiction where proceedings are instituted or 90 days after the person instructing the claim has served the claim or been served with process in the action against itself, whichever is the earlier.

Jurisdiction

Article 66 provides that the provisions on Jurisdiction are only binding on States if they declare in accordance with Articles 74 and 91 that they wish to be bound by them. Unless the contract of carriage has an exclusive choice of court agreement, proceedings against the carrier may be instituted, pursuant to article 66(a): in a court which is either in the domicile of the carrier, the place of receipt agreed in the contract of carriage, the place of delivery agreed in the contract of carriage or the port where the goods are initially loaded on the ship or the port where the goods are finally discharged from the ship. Under article 66(b) they can be instituted in a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding a claim against the carrier that may arise under the Convention.

However it is provided in article 67 paragraph 1 that exclusive choice of court agreements under article 66(b) can only be entered into provided they are contained in a volume contract (and there are specific provisions dealing with what such contracts are required to state). It is provided in article 67, paragraph 2, that a person who is not a party to a volume contract is only bound by an exclusive choice of court agreement under article 67 paragraph 1, in certain circumstances, including that it is a Court in one of the places designated in article 66(a), the agreement is contained in a transport document or electronic transport document and is given "timely and adequate notice of the court where the action shall be brought and that jurisdiction is exclusive." It is unclear whether it will be sufficient if the bill of lading simply states that information and the person concerned has received a copy of the bill.

Arbitration

There are also new provisions dealing with arbitration. They are contained in articles 75 to 78, but article 78 specifies that those provisions will only be binding on contracting States that declare, in accordance with article 91, that they will be bound by them (ie this is also an opt in provision).

The scheme of the provisions dealing with arbitration is the same as for jurisdiction and permits arbitration proceedings, at the option of the person asserting a claim against the carrier, to take place at any place designated for that purpose in the arbitration agreement or any place situated in a State where any of the following places is located: the domicile of the carrier, the place of receipt agreed in the contract of carriage, the place of delivery agreed in the contract of carriage or the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship. (article 75, paragraph 2).

However, article 75, paragraph 3, provides that the designation of the place of arbitration in the agreement is binding on the parties if it is

contained in a volume contract that contains certain provisions.

Article 75, paragraph 4, is somewhat differently worded from what it might be assumed is intended to be its equivalent provision relating to jurisdiction in article 67, paragraph 2. Article 75, paragraph 4, says:

> "When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:
>
> a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2(b) of this article;
>
> b) The agreement is contained in the transport document or electronic transport record;
>
> c) The person to be bound is given timely and adequate notice of the place of arbitration; and
>
> d) Applicable law permits that person to be bound by the arbitration agreement."

Article 76 provides that "nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation...".

Live Animals

Article 81 reflects the current position under the Hague Rules in so far as "live animals" are concerned, and provides that the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party in relation to such cargo unless "the claimant proves that the loss of or damage to the goods or delay in delivery resulted from an act or omission of the carrier or of a person referred to in article 18, done recklessly and with knowledge that such loss or damage, or that the loss due to delay, would probably result".

Special Circumstances

Article 81 also seeks to reflect the final paragraph of article 6 in the Hague Rules and permits a special regime to apply where:

> "The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods."

Electronic Documentation

The use of electronic transport documents has obviously taken place since the Hague, Hague-Visby and even Hamburg Rules regimes were agreed. Australia's modified Hague Rules sought, in a limited way, to recognise the existence of electronic documentation with its incorporation of a definition of "data message" and "writing" to include

"electronic mail, electronic data interchange…".

Article 8 of the Convention recognises that anything that is required under the Convention to be in or on a transport document may be recorded in an "electronic transport record" which, like "electronic communication", is defined in article 1, paragraphs 18 and 17 respectively.

They provide as follows:

- 17: "Electronic Communication" means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.
- 18: "Electronic Transport Record" means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier so as to become part of the electronic transport record that:
  - Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and
  - Evidences or contains a contract of carriage.

Article 9 identifies the procedures for the use of negotiable electronic transport records and article 10, the procedure for the replacement of such records where the carrier and the holder agree to replace them.

Articles 50 to 56 are also new and relate to electronic documents. They deal with the "Rights of the controlling party". That term is defined in paragraph 13 of article 1 as meaning "the person, that pursuant to article 51, is entitled to exercise the right of control" and "Right of control" is defined in paragraph 12 of article 1 as meaning "the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with Chapter 10". That Chapter, which includes articles 57 and 58, is headed "Transfer of Rights".

Article 50 limits the right of control to giving or modifying instructions in respect of the goods that do not constitute a variation of the contract of carriage, the right to obtain delivery of the goods at a scheduled port of call, or in respect of inland carriage, any place en route; and the right to replace the consignee by another person including the controlling party.

Pursuant to article 51, the shipper is deemed to be the controlling party, unless when the contract of carriage is concluded, it designates the consignee, the documentary shipper or another person as the controlling party (article 51, paragraph 1).

The transfer of rights provisions are also new. They confirm in article 57, paragraph 1, that when a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person and also, in article 58, makes it clear that a holder (which term is defined in paragraph 10 of article 1, as being a person that is in possession of a negotiable transport document, and if the document is an order document, it is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed, or if the document is a blank endorsed order document or bearer document is the bearer thereof) that is not the shipper and does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder. This position changes where the holder does exercise any right, (article 57 paragraph 2) but certain activities do not amount to an exercise of rights (article 57 paragraph 3). That position may be different where a non-negotiable transport document or a negotiable transport document or a negotiable electronic transport document is issued pursuant to the provisions of article 51 paragraphs 2, 3 and 4.

Limits of Liability

This introduces new amounts to which the carrier is entitled to limit its liability. It goes beyond the Hamburg limits and specifies a limit to the carrier's liability of 875 units of account (40 more than under the Hamburg Rules) per package or shipping unit or 3.0 units of account per kilogram of the gross weight of the goods (.5 of a unit more than the Hamburg Rules) (article 59).

The amount that can be recovered for delay, under Article 60, is two and a half times the freight on the goods delayed, and the total amount that can be recovered under articles 59 and 60 is no more than for the total loss of the goods under article 59 (the same as the Hamburg Rules) (article 62).

The right to limit is lost in similar circumstances to that under the Hague and Hamburg regimes (ie. where there has been a personal act or omission of the person claiming a right to limit done with the intention to cause such loss or recklessly, and with knowledge that such loss would probably result (article 61)).

Deck Carriage

Deck carriage is covered by article 25. It will be recalled that the Australian modified regime amended the old Hague Rules regime by deleting the exclusion from the definition of "Goods" that applied to cargo which is stated as being carried on deck and introduced specific provisions in article 2 to deal with deck carriage.

Article 25 provides that goods may be carried on deck only if:

> "a) Such carriage is required by law
>
> b) They are carried in or on containers on decks that are specially fitted to carry such containers or vehicles; or

c) The carriage on deck is in accordance with the contract of carriage or the customs, usages, and practices of the trade in question."

Where sub- paragraphs 1(a) or (c) apply, the carrier is not liable for the loss of or damage to such goods or delay in their delivery "caused by the special risks involved in their carriage on deck" (article 25, paragraph 2).

Pursuant to article 25, paragraph 3, where, however, goods are carried on deck in situations other than those identified in paragraph 1 of article 25, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck and is not entitled to rely on any of the defences (ie the listed exceptions) contained in article 17.

Paragraph 4 of article 25 provides that the carrier cannot invoke sub-paragraph 1(c) of article 25 against a third party that has acquired a negotiable transport document or negotiable electronic transport record in good faith "unless the contract particulars state that the goods may be carried on deck".

Paragraph 5 of article 25 provides that the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage or delay resulted from their carriage on deck, where the carrier and shipper have expressly agreed that the goods would be carried under deck.

Shipper's Liability

There are some significant provisions dealing with the basis of the shipper's liability to the carrier in Chapter 7, articles 27-36. It will be recalled that the current regime has very little to say about the duties and obligations of shippers. Article 3, Rule 5 of the Hague Rules, deems the shipper to have guaranteed the accuracy of the information that it supplies in relation to the goods and contains a right of indemnity by the carrier against the shipper arising from any loss, damage or expense that it suffers as a result of inaccuracies in those particulars). It is that sort of information which will be required to be given under article 36.

Article 27 "Delivery for carriage" provides that:

" Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property."

Article 29 requires that the carrier and the shipper co-operate in providing information and instructions and article 30 says:

"a) The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not

otherwise reasonably available to the carrier, and that are reasonably necessary:

i) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party…"

Under article 30 there is a general provision in paragraph 1 that makes the shipper liable for loss and damage sustained by the carrier if the carrier proves that it was caused by a breach of the shipper's obligations under the Convention. One of those obligations is contained in article 31 (paragraph 1), and that is to provide accurate information for the compilation of the contract particulars, such as are required under article 36 (Contract particulars).

Paragraph 2 of article 31 replicates the position under article 3 rule 5 in the current regime, whereby the shipper is deemed to have guaranteed the accuracy of the particulars.

Article 32 contains "Special rules on dangerous goods". They provide that:

"a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure."

The current provisions in article 4 rule 6 of the Hague Rules are not as explicit. It will be recalled that they simply provide:

"6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed in any place or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent should become a danger to the ship or cargo, they may in like manner be landed in any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any."

The proposed new provisions on dangerous cargo surprisingly do not replicate the right given to the carrier under the present regime to discharge or destroy or render innocuous where the carrier has not consented to carry them, although articles 15 and 16 provide the carrier with sufficient rights in that regard.

Article 33 makes a documentary shipper subject to the same liabilities as a shipper. (A "documentary shipper" is defined in article 1 paragraph 9 as meaning a person who "accepts to be named as "shipper" in the transport document or electronic transport record". Article 34 makes the shipper liable for the acts of anyone to whom it has entrusted the performance of any of its obligations, (but not those of the carrier or a performing party to which it has entrusted any of its obligations).

Transport Documents and Electronic Transport Records

There are some important provisions in Chapter 8, articles 35 to 42. They include, for example, the shippers entitlement to obtain from the carrier a non-negotiable transport document, or non-negotiable electronic transport record or an appropriate negotiable transport document, or negotiable electronic transport document (article 35). Article 36 identifies what information is required to be contained in those documents (largely the same as the current article 3 rule 3, but with the inclusion of the identity of the carrier (name and address)). Articles 37 and 38 deal with "Identity of the Carrier" and "Signature". Article 39 deals with the topic of "Deficiencies in the contract particulars"; Article 40 deals with "Qualifying the information relating to the goods in the contract particulars", and article 41 deals with the "Evidentiary effect of the contract particulars."

Article 42 is headed "Freight Pre-Paid" and confirms what the law of estoppel has to say about the inability of a carrier to seek freight from the holder of a bill of lading or a consignee when the bill of lading has been endorsed "freight pre-paid", unless of course the holder or the consignee is also the shipper.

Volume Contracts

This is an area which is new to cargo liability regimes. A "volume contract" is defined in paragraph 2 of article 1 as follows:

> "Volume contract means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range."

The significance of such contracts is that article 80 provides that:

> "1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention."

However, the volume contract must contain a prominent statement that it derogates from the Convention, it must be individually negotiated, prominently specifies the sections of the volume contract containing the derogations, the shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with the Convention without any derogation, the derogation is not incorporated by reference from another document, or included in a contract of adhesion that is not subject to negotiation, a carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of article 80, but a volume contract may incorporate such documents by reference.

By article 80, paragraph 4, it is provided that a carrier cannot in a volume contract exclude itself from liability to make and keep the ship seaworthy, properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage (article 14); a shipper cannot contract out of its obligations to provide information, instructions and documents under article 29, nor from its obligations in relation to dangerous goods under article 32 and nor can a carrier contract out of article 61, that is, the provision which identifies the circumstances in which the loss of the benefit of limitation of liability can be achieved.

Article 80 goes on to say that the terms of the volume contract which derogate from the Convention, which satisfies the article can also apply between the carrier and a person other than the shipper, provided that such other person received information that prominently states that the volume contract derogates from the Convention and gives its express consent to be bound by such derogations and that such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

By paragraph 6 or article 80, it is provided that the party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

Validity of Contractual Terms

Article 79 provides that any term in a contract of carriage is void to the extent that it directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention, or for breach of an obligation under the Convention, and also provides that it is void to the extent that it directly or indirectly excludes limits or increases the obligations under the Convention of the shipper, consignee, controlling party, holder or documentary shipper, or in respect of the breach of any of their obligations under the Convention (ie not dissimilar to article 3 rule 8 of the Hague Rules).

Miscellaneous

It is provided that nothing in the Convention affects:

- Global limitation of liability (article 83)
- General average (article 84)
- Passengers and luggage (article 85)
- Damage caused by nuclear incident (article 86)

The Convention will enter into force 12 months after it is ratified by 20 countries (article 94).

Stuart Hetherington is a Partner of CBP; he was a member of the Working Group that advised the Australian Government prior to the introduction of Australia's modified Hague-Visby regime, is a former President of the Maritime Law Association of Australia and New Zealand, and a Vice President of the Comite Maritime International (CMI).

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