

# International Carriage of Goods by Sea (Week 6 & 7)

Shipper – enters into a contract with the carrier – goods are transported under a contract of sale – The incoterms determine whether the buyer or seller is the shipper

Carrier – is contracted to provide carriage of the goods (Under Australian Law, the carrier must be the ship owner or charterer (hirer) of a ship).

Consignee – person whom the goods are being delivered to.

## **Shipping Documents**

- Ocean or Marine Bill (also sometimes shipped Bill) is issued by the carrier: It performs three functions
  1. Evidence of receipt of goods by carrier and shipment of goods by the seller
  2. A document of title
  3. Evidence of terms of the contract
- Other sea carriage documents (such as sea waybills, delivery orders, mate's receipt) do not perform all three functions

## **Elements of a Ocean or Marine Bill of Lading**

### **1. Receipt for Goods/Evidence of Shipment**

- a. Bill is issued by the carrier or its agent, or master of the ship – it describes the goods put on board: quantity and condition.
- b. Goods are checked for external condition by the carrier upon loading – either clean or clause bill of lading
  - i. Clean – If all is in order, which certifies that the goods received are in good order and properly loaded. 'External' conditions – 'apparent good order', while the internal condition is unknown also acknowledges the shipper's condition of loading and stowing.
  - ii. Clause – if there is evidence of damage then it can be noted on the bill.
- c. The rationale of a clean and clause bill is to provide evidence for claims against the carrier if the goods have been damaged, or that the damage was inherently from the seller's obligations.

### **2. Document of Title (Represents ownership)**

- a. Negotiable (bearer and to order bills) and Non-negotiable Bills - 'Negotiation' = sale of goods
- b. **Significance of the transfer of a Bill in a sale of goods contract** - Interpreted as the transfer of ownership of goods from B to S
- c. A 'reservation of title' clause can be included in the contract of sale - Seller reserves title to goods until goods paid for in full, which prevents the title from passing to the buyer when the buyer takes possession of a negotiable Bill of Lading.

### **3. Evidence of Terms of Carriage**

- a. Bill of Lading provides evidence of terms and conditions under which the goods are carried – best evidence of contract between the shipper and the carrier.

*Pyrene Co v Scindia Navigation Company [1954]* - Carriage by sea-F.o.b. contract- Contract of carriage made by buyers with shipowners- Delivery at dockside by sellers resulted in fire damage. The Bill of lading provided evidence of the bearing of liability when there was two separate contractual documents between the shipper and the carrier.

### **International Shipping Rules and Australia's Modified Rules**

- **The Hague Rules** - International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924
- **The Hague Visby Rules** - Brussels Protocol Amending the Hague Rules Relating to Bills of Lading 1968 and Protocol 1979
- **The Hamburg Rules** - Carriage of Goods by Sea 1978
- **The United Nations Convention on the Contract for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules)** – not in force, held back by GFC.

**Rules for Australia** – used to apply the Hague rules, but denounced them when signed up to the Hague-Visby Rules – AU signed, but never ratified or gave force of law in Australia to the Hamburg rules.

- Australian domestic law incorporates the Hague Visby Rules, BUT Australia has introduced a 'Hybrid' system – Modified Version of the Hague Visby Rules.

#### **Article 10 (Carriage of Goods by Sea Regulations 1998)**

- **Rule 1** – MHVR applies to outbound carriage of goods from Australia, there rules apply to sea carriage documents relating to the carriage of goods from ports in Australia to ports outside Australia.
- **Rule 2** – Apply to inbound sea carriages unless the Hague, Hague Visby or Hamburg Rules apply – **Rule 3**
- **Rule 4** - applies the amended Hague Rules (as modified) to Australian interstate cargoes
- **Rule 5** - exempts from the amended Hague Rules (as modified) Australian coastal cargo where the sea carriage document is a consignment note, except where the cargo is international cargo being carried coastally.
- **Rule 6** - exempt goods carried under a charter party from the amended Hague Rules (as now modified), unless a sea carriage document, as defined in Article 1, is issued.

- Rule 7 - applies the amended Hague Rules (as now modified) to a sea carriage document issued under a charter party only if it is a negotiable sea carriage document (ie. a bill of lading or similar document).

Modified Version of the Hague Visby Rules:

- **HVR (Article 10)** only apply where goods transported under a negotiable bill of lading
  - In modern shipping other documents are often used - especially where transport is 'multimodal' (ie. by combination of two or more of land, air and sea)
  - **MHVR (Art 10)** apply to shipments under a 'sea carriage document'
- **HVR (Article 1(c))** exclude live animal and cargo carried on deck
  - In modern shipping most goods carried by container vessels - no 'below deck'
  - **MHVR (Art 1(c))** applies to goods carried on deck – except live animals
- **HVR (Article 1(e))** apply 'tackle to tackle'
  - Refers to old fashioned loading method of hoisting goods onto the ship's deck over the ship's rail - from loading to discharge
  - **MVHR (Art 1(3))** apply 'port to port': carrier liable when goods enter port to exit
- **HVR (Article 4 r4)** covers carrier liability for delay/deviation poorly
  - **MHVR Art 4A** is a new article dealing with liability for delay

Hague Visby Rules	Modified Hague Visby Rules
Article 1(c)- exclude live animals (1)and cargo carried on deck and by the contract as stated as being carried on deck. (2) and is so carried.	MHVR (Art 1(c)) applies to goods carried on deck – except live animals
HVR (Article 1(e)) apply 'tackle to tackle' Refers to old fashioned loading method of hoisting goods onto the ship's deck over the ship's rail - from loading to discharge	MVHR (Art 1(3)) apply 'port to port': carrier liable when goods enter port to exit
HVR (Article 4 r4) covers carrier liability for delay/deviation poorly	MHVR Art 4A is a new article dealing with liability for delay
HVR (Article 10) only apply where goods transported under a negotiable bill of lading	MHVR (Art 10) apply to shipments under a 'sea carriage document' MVHR (Article 10 r2) – from ports outside Australia to Ports in Australia

	MVHR (Article 10 r1) – from ports inside Australia
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### Applying Modified Hague Visby Rules

#### 1. Rules for Goods Leaving Australia – Article 10 (1) MHVR

- If the goods are leaving under a sea carriage document (Section 89 Goods Act) – Are the goods satisfied under Article 1(c) of the MHVR, if yes then the MHVR's apply, however if not then they are subject to the terms of the contractual agreement.

#### 2. Rules for Goods Coming into Australia – Article 10 (2) MHVR

- Identify which rule the country is contracting to (Signatory) and do they have an international sea carriage regime? If yes, then are the criteria of the Article 10+1(c) HVR or HR or Article 2 + 1(5) Hamburg rules satisfied?
- If yes then the relevant convention applies.

### **Carriers Obligations under the Sea Carriage Rules**

**Article 3, Rule 1** : Seaworthiness - The Carrier must shall be bound before and at the beginning of the voyage to exercise due diligence to:

- a. Make the ship seaworthy
- b. Properly man, equip and supply the ship
- c. Make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation

The obligation to ensure a ship is seaworthy is not an absolute one

- '*before and at the beginning of the journey*' – Not liable for damage caused by lack of seaworthiness that arises later on
- '*due diligence*' – A breach does not occur just because a ship is unseaworthy, but only where that unseaworthiness is a result of the carrier's lack of due diligence

The Aquacharm (1983) - Seaworthy means: 'the vessel- with her master and crew- is herself fit to encounter the perils of the voyage and also that she is fit to carry the cargo safely on that voyage.'

Riverstone Meat Company v Lancashire Shipping Co (The Muncaster Castle) [1961] - Cargo of canned ox tongue damaged by water due to the negligent work of a ship-fitter hired by the carrier. The ship-fitter failed to re-fix inspection covers to storm valves, which permitted entry to the water.

- Court found for the shipper. Held that the carrier had failed to use due diligence in making the ship seaworthy. The ship and therewith the fitter's negligence was the carrier's responsibility.

The Good Friend (1984)- Ship was unseaworthy because the holds were infested with a parasi/c insect which contaminated the cargo carried. The carrier had not used due diligence to make the ship seaworthy as the ship was not properly cleaned before receiving the new goods.

The Waltraud (1991)- a ship which was otherwise seaworthy, was rendered unseaworthy when it carried containers which it did not have the equipment to properly secure.

**Article 3 – Rule 2** - subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

- Higher standard of care than 'reasonable care' – carrier must have the appropriate skills and a sound system in place to load, carry, keep – discharge extends to unloading the goods.

Pacific Composites v Transpac Containers (1998) - Contract of carriage term that goods would be carried under refrigeration. Goods were not refrigerated during the voyage and were consequently unusable. Court found that the carrier failed to provide the refrigeration required and therefore did not properly carry or care for the goods.

Shipping Corp of India v Gamlen Chemical Co (1980) - Gamlen sent drums of cleaning solvent shipped under clean bill of lading issued by India Corp from Sydney to Indonesia. Ship encountered heavy weather across the Great Australian Bight (GAB), known for its rough conditions, and goods broke adrift from rope lashings. On arrival, significant damage to goods was found. Application of Hague Visby Rules (before MHVR enacted). Court addressed question of whether carrier had breached Article 3, r2

- Court found that the carrier had failed to properly stow goods. Importantly, the stowage of goods was inadequate considering the weather they could anticipate in the GAB. Therefore the stowage of goods may be sufficient to discharge duty of proper care for one particular journey, but not another. A case by-case approach.

**Article 3 – Rule 4** – the sea carriage document is prima facie evidence of the receipt of the goods as described on the document and; The carrier can not introduce proof that the goods were not received in the condition described on a negotiable sea carriage document (i.e. Bill of Lading) if it has been transferred to a third party acting in good faith.

The Dona Mari (1973) - Thai shipper delivered broken tapioca roots for shipment. The carrier issued two 'mate's receipts' which stated goods were not quite dried. On

loading, the carrier issued two clean bills of lading which stated that the goods were 'shipped in good order and condition.' On arrival cargo was damaged because goods were moist on loading.

- Court's Decision: Against Carrier. The BoL was conclusive evidence that the goods were in good order on loading.
  - So, between the shipper and the carrier, the BoL is rebuttable evidence of the condition of the goods
  - But, if the BoL is endorsed to a third party in good faith (e.g. from the shipper/seller to the buyer), then the carrier can not introduce evidence which contradicts that which is contained in the BoL
- Article 3 r.4 intends to prevent carriers and their agents from fraudulently issuing clean BoL. (Sales contracts often require B's payment against a clean BoL)

**Order of Proof** - If there is a clean bill of lading and goods arrived damaged or don't arrive, there is a prima facie breach of Article 3 rule.2

- It then falls on the carrier to argue that one of the excepted perils apply.
- If carrier can demonstrate a peril, then cargo owner can defeat that immunity if can show that the carrier was in breach of Art 3 r2 or that the ship was unseaworthy at the beginning of the journey and this was the cause of the loss

## **Carrier Defences**

**Article 4 – Rule 1** – neither the carrier nor the ship shall be liable for loss or damage or resulting from unseaworthiness **unless caused by want of due diligence on the part of the carrier to make the ship seaworthy**, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

- Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

**Article 4 – Rule 2** – Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

- a. Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.
- b. Fire, unless caused by the actual fault or privity of the carrier.
- c. Perils, dangers and accidents of the sea or other navigable waters.
- d. Act of God

- e. Act of War
- f. Act of public enemies
- g. Arrest or restraint of princes, rulers or people, or seizure under legal process.
- h. Quarantine Restrictions
- i. Act or omission of the shipper or owner of the goods, his agent or representative.
- j. Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.
- k. Riots and Civil commotions
- l. Saving or attempting to save life or property at sea
- m. Wastage in Bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
- n. Insufficiency of packing
- o. Insufficiency or inadequacy of marks
- p. Latent defects not discoverable by due diligence
- q. Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

### **Carriers Immunities**

- a. **The 'Nautical Fault Defence'** – (a) Act, neglect, or default of master, mariner, pilot, or servants of the carrier in the navigation or in the management of the ship  
*Chubu Asahi cotton Spinning Co v The Ship Tenos (1968)* - Crew member filled tanks for vegetable oil with fresh water to test them. His negligence caused the water to overflow and damage cargo of wool. The action had nothing to do with the Navigational aspects of the ship and was concerned with management and therefore the Nautical defence could not apply  
*Mining & Manufacturing v Ship Novoaltaisk [1972]* - Crew member filled ship's own fresh water tanks and due to negligently damaged cargo in process. These fresh water tanks were used for the crew to drink etc. The carrier relied on the Nautical Fault Defence, and it was found that it fell within the scope of the defence as those fresh water tanks were essential to the ships ability to navigate the seas
- b. **The Perils of the Sea Defence** – (c) Perils, dangers, and accidents of the sea or other navigable waters  
*Skandia Insurance Co Ltd v Skoljarev (1971)* - the loss or damage is on the balance of probabilities attributable to a fortuitous accident of casualty of the sea. rather than to some other cause such as the ordinary action of the wind and waves or wear and tear'

Great China Metal Industries v Malaysian International Shipping Corp (The Bunga Seroja) [1998] - Aluminium coils were damaged as ship crossed the Great Australia Bite to Taiwan. Bad weather was predicted prior to journey, but the weather encountered was much worse. Two arguments:

- Cargo –owner argued that the carrier failed to take proper care of the goods (suggested that the ship should have delayed voyage) and that the carrier could not rely on the ‘perils of sea’ immunity because the weather had been predicted. It was therefore a foreseen event and could be guarded against.
- However, the court held that the bad weather could constitute a peril of the sea even though it was predicted. Moreover, the claimant failed because there was no breach of Art 3. The goods had been carefully stowed.

**The Over-riding Duty of Proper Care of Cargo (Article 3 rule 2)** – if cargo is damaged and the damage falls within one of the immunities, the carrier may still be liable if an underlying cause of the damage is the carrier’s failure to exercise proper care in carrying out its fundamental duties.

Shipping Corp of India v Gamlen Chemical Co (1980) - Chemical solvents carried over the GAB damaged because the crew had failed to stow them adequately. The system used was not adequate for the conditions on the GAB. The carrier sought to rely on the perils of the sea defence – argued that the goods would be ok if the ship had no encountered rough seas. Court found that where there are two causes of damage and one of those causes is the negligence of the carrier, then the carrier can not rely on the perils defence (negligence facilitated the peril of the sea to inflict damage to the cargo).

## **Carriers Liability**

**Article 4 – Rule 5** - specifies the limits of a carrier’s financial liability arising from a breach of obligations under Art 3.

- a. Unless the value of goods is declared on the Sea Document:
  - i. A carrier is not liable for any loss or damage to goods exceeding 666.67 units of account per package or unit, or
  - ii. 2 unit of account per kilogram of goods damaged or lost, whichever is higher
- b. Can agree on higher liability, but a carrier can not reduce its liability below this baseline (except where special goods/ goods carried on deck).



- c. Article 4 – Rule 5(e) - Carriers' recourse to Article 4 - rule 5(a) is lost where loss or damage is caused by an act or omission intended to cause damage, or, done recklessly and with knowledge that damage would probably result.

**Article 4 Rule 5 (d) - Unit of Account:** 'Special drawing right' as defined by the IMF = 1 XDR = \$1.80 as of 21<sup>st</sup> October 2016

- *El Greco (Australia) Pty Ltd & Anor v Mediterranean Shipping Co. SA (2004)*

**Article 4 – Rule 4 - Carriers Liability for Deviation:** Any deviation in attempting to save life or property at sea or any reasonable deviation shall not breach the rules or the contract of carriage and the carrier shall not be liable for any loss or damage which results from delay.

*Thiess Brothers (Old) Pty Ltd v Australian Steamships Pty Ltd [1955]*– Carrier deviated to pick up fuel. However, as the fuel was not necessary for the completion of that particular voyage, it was not a reasonable deviation within Art 4 r.4.

**Article 4A – Carrier Liability for Delay** - Under the MHVR only a carrier is liable for any delay while the goods are in the carrier's charge unless

- a. delay is excusable, AND
- b. carrier took all measures necessary to avoid delay

**Article 4A contains a list of 'excusable delay' which includes:**

- a. If caused by deviation authorised by shipper or terms of contract of carriage
- b. Circumstances beyond the reasonable control of carrier
- c. Reasonably necessary for safety of ship
- d. Saving human life or aiding ship in distress.
- e. Barratrously (unlawful) conduct of master or crew

Damages arising from delay covered by Art 4A are different to those applicable to loss or damage under Article 3.

- Article 4A (6) liability for loss caused by delay is limited to amount of loss, or, two and a half times the cost of sea freight payable for goods delayed, or total amount payable as sea freight for all of the goods, whichever is the lesser.

**Article 3-Rule 6 - Notice and Limitation of Claims Period** - Notice must be given to carrier of loss or damage at port of discharge or if not apparent, then within 3 days of removal of goods

- Otherwise removal is evidence of delivery of goods as the goods were described in the relevant sea carriage document
- Limitation period of 1 year to bring a claim

**Whom bears the Liability** – under Hague, Hague Visby and MHVR

- 'Carrier' includes the owner or charterer of a ship that enters into a contract of carriage with the shipper
- Important to identify the party who entered into contract with shipper - Usually indicated on the BoL/Sea Carriage Document

#### **Note Shippers' Obligations/Liabilities**

- Article 3 Rule 5 – Guarantee accuracy of particulars of goods to carrier
- Article 4 Rule 6 – No dangerous goods without carrier's consent

*Effort Shipping v Linden Management [1988]* - Groundnut extractions infested by Khapra beetle, posed no direct physical threat to other cargo (wheat), but ship denied permission to offload any cargo because of infestation and all cargo was dumped at sea. Court found that Article 3 Rule 5 makes shipper liable for all damages and expenses directly or indirectly arising out of or resulting from the dangerous goods