certifying that the vessel has been built according to specifications and in fit and proper condition ...'.
- Documents presented by beneficiary appeared to comply, and payment was made.
- in fact the certificate was a forgery.
- Buyer-applicant sued the issuing bank.

HELD: Bank not liable. Bank fulfilled its duty to examine docs with reasonable care; not liable for failure to discovery forgery.

Sztejn v Henry Schroeder Banking Corporation Ltd **(1941)**

- Fraudulent Seller.
- Advising bank paid against documents which conformed on their face with the requirements of the credit.
- Advising bank knew of the fraud when payment was made.
- Buyer and issuing bank refused to reimburse the advising bank.

HELD: Advising bank's claim for reimbursement denied. If the advising bank knew of the fraud, it should never have made payment at all.

Study Guide

1. On 3 January 2011, Solar Toys in Australia contracted to sell to Taipei Toys ("TT"), a children's toys store in the city of Taipei, Taiwan, 2500 solar-powered walking crocodile toys. The price was AUD $10,000 for delivery FOB Sydney. Since TT was a first time customer, Solar Toys required payment by letter of credit.
   On 14 January, Solar Toys received advice from Austral Bank that China Bank in Taiwan had issued a letter of credit in favour of Solar Toys as beneficiary. China Bank authorized Austral bank to act as advising and negotiating bank. The letter of credit, which expressly mentioned the UCP600, was payable on presentation of the beneficiary's bill of exchange drawn on China Bank together with the following documents:

   • A commercial invoice for 2500 solar-powered walking crocodile toys;
   • A full set of clean on board negotiable marine bills of lading, consigned to order 'blank endorsed' and marked 'freight pre-paid';
   • A certificate of origin signed by Australian Customs or its authorized agency;
   • A packing list in duplicate.

   In addition the instructions stated that presentation was to be made 'within 15 days of shipment and within the validity of the credit.' On Wednesday 19 January 2009, the goods were loaded on board a ship for transportation and a clean bill of lading was issued. Solar Toys presented the shipping documents together with a bill of exchange drawn on China Bank to Austral Bank on Friday 4 February.

   On 11 February Austral Bank indicated that it refused to pay because the documents presented did not conform to the requirements of the letter of credit. In response to further queries by Solar Toys, Austral Bank explained that the problem with the documents is that the bill of lading presented by Solar Toys is marked "Freight Collect" instead of "Freight Prepaid" as required under the terms of the letter of credit. In addition, the certificate of origin presented by the beneficiary is signed by an officer of "Aussie Inspections" without any indication that "Aussie Inspections" has any authority from Australian Customs. Finally, Austral Bank also informed Solar Toys that the presentation was made outside the validity of the credit.

Question Ten – [international dispute settlement] 6 marks

UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006

Article 10. Number of arbitrators
Art. 10, (1): The parties are free to determine the number of arbitrators.
Art. 10, (2): the number of arbitrators shall be three unless otherwise agreed

Article 11. Appointment of arbitrators
Art. 11 (3)(a): one arbitrator appointed by each party, These two arbitrators agree on a third

Article 12. Grounds for challenge
Art. 12, (1): When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to doubts about her impartiality.
Art. 12, (2): An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence or qualifications.

Chapter V CONDUCT OF ARBITRAL PROCEEDINGS
Article 18. Equal treatment of parties
Art 18: The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure
Article 19(2) Tribunal may determine procedure if parties haven't agree on the procedure to be followed

Article 22. Language
Article 22. (2)Tribunal can order translations

Article 20. Place of arbitration
Article 20. **(1)** The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

JURISDICTION OF ARBITRAL TRIBUNAL Article 16.
Article 16 (1) Tribunal may rule on its own jurisdiction
Article 16 (1) 续上 arbitration clause in a contract treated as a separate agreement (eg. if rest of contract is void/ voidable, validity of arbitration clause/ agreement not affected)
Article 16 (2) Any challenge to jursidiction must be made asap.

Choice of Law issues in International Commercial Arbitration （不考）

- Law governing the substantive claims in the contractual dispute-----CISG 的 governing law (eg. Contract of sale is governed by the law of Singapore).
- Law governing arbitration agreement--------合同里的规定为准
  (eg. parties meet in Hong Kong and sign an agreement to arbitrate, "Any disputes arising out of this arbitration agreement shall be decided in accordance with the law of Hong Kong").
  - Law governing the arbitral procedure

3. Carrier may defend themselves against these claims with the following defences or immunities:

Article 4, Rule 1: 'Due Diligence' (MHVR)

Carrier is not "liable for loss or damage arising from unseaworthiness unless caused by want of due diligence" (AKA they're not liable unless they failed to use due diligence)…"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 2x: Carriers' Immunities (MHVR)

Carriers can avoid liability by establishing that cargo loss or damage resulted from a listed immunity under Article 2, Rule 2

If cargo is damaged and the damage falls within one of the exemptions, 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 under Art 3 r2, i.e. carriers are not entitled to rely on the immunities as a defence to lack of due diligence in ensuring seaworthiness

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 lock-outs 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 or 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.

***privity = knowledge**

Article 4, Rule 2(a): 'Nautical Fault' Defence (MHVR)

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (a) Act, neglect, or default of master, mariner, pilot, or servants of the carrier *in the navigation or in the management of the ship*

Refers to management of ship as a 'navigational unit' not as a cargo carrier

Activities not relating primarily to navigation of the ship are not encompassed in the immunity

However, a carrier will *not be liable* for acts or omissions that are in 'navigation and management' of the ship, no matter how grossly negligent

Chubu Asahi Cotton Spinning Co v The Ship Tenos (1968) 12 FLR 291

Crewmember filled tanks for vegetable oil with fresh water to test them. His negligence caused the water to overflow and damage cargo of wool.

Was the crewmember's action found to be an activity which related to the 'management of the ship' or to the cargo-carrying function of the ship?

Cargo owner took a claim against the carrier

Prima facie breach Art 3 rule 2

They had a clean BoL

Carrier relied on the Nautical Fault Defence

Determined the carrier was not allowed to use this defence as what the crew member was doing had nothing to do with the navigation and management of the ship

Mining & Manufacturing v Ship Novoaltaisk [1972] 2 NSWLR 476

Crewmember filled ship's own fresh water tanks and due to negligently damaged cargo in process.

INTERNATIONAL AIR CARRIAGE (MC + CARRIER'S LIABILITY)

Question 5 (3 marks), Question 6 (5 marks), Question 7 (2 marks)

Questions to consider on air carriage:

- Which version of the conventions apply? (For our purposes, check that the **MC 1999** criteria are satisfied)
- Are the goods lost or damaged? Is there liability for the carrier under **Article 18(1)** or do any of the defenses under **Article 18(2)** apply?
- Is there damage or loss? Are the claimants notice requirements satisfied? **(31)**
- Does the damage (economic loss, loss of goods or damage of goods) arise from delay? Is there liability under **Art. 19**?
- Is the loss or damage due to the claimants own negligence? **(A20)**
- Which 'carrier' should be pursued? Is there successive carriage (A36)? If not, can you apply the concept of contracting carrier **(A39-41)**?
- Where can the claimant bring an action? **(A33/36)**
- If there's liability, what is the max compensation of carrier? **(A22)**
- Is the claim within the limitation period? **(A35)**

MONTREAL CONVENTION 1999

With Warsaw Convention notations

Checklist for Air Carrier's Liability for Cargo

1. Which international regime of air carrier's liability applies?

- The newest convention a State Party has signed up to applies
- Oldest to newest: Warsaw Convention, Warsaw-Montreal Convention No.4, Montreal Convention

Article 1 Scope of application

1. Convention applies to all international carriage of sea persons, baggage or cargo performed by aircraft for reward.

2. International carriage: any carriage which the place of departure and destination are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State (even if that state is not a State Party).

According to the agreement of parties

Whether or not there is a break in the carriage

3. Carriage by successive carriers is deemed to be one undivided carriage if it is regarded by the parties as a single operation – does not matter if it constitutes a series of contracts or if one of contracts is for domestic carriage

2. Who is the carrier? Who should the consignee/consignor sue?

Article 36 Successive carriers

1. Each carrier of successive carriers is subject to the rules set out in this Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2. Any person entitled to compensation can take action only against the carrier which performed the carriage during which the accident or the delay occurred, the first carrier has assumed liability for the whole journey.

3. (same in Warsaw Convention)

Consignor has right of action against the first carrier

Consignee has right of action against last carrier

Each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place

Also makes clear that successive carriers are jointly and severally liable.

N.B. This is all the same in Warsaw Convention

CASE: In re Aircrash Disaster at Warsaw Poland (1984)

US Olympic boxing team flew from multiple different domestic locations with domestic carriers to New York, then to Warsaw, Poland for tournament using LOT Polish Airlines

Aircraft crashed near Warsaw, they all died

Under old Warsaw Convention, a ticket has to carry 'readable notice' to incorporate the liability regime and limits. The notice on LOT's tickets was too small to read, but domestic tickets were readable.

LOT claimed it was readable, and that the domestic and international carriage was a successive carriage.

The court found that it was not successive carriage, and that tickets for domestic and international flights were bought separately. Neither the domestic carriers nor LOT had any knowledge of the other's carriage role.

Carriage is not a single operation, and then 'Advice to International Payments' on domestic tickets has no effect.