

Bills of Lading: Do they Have a Future?

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For the purposes of this paper, two principal topics will be addressed: title to sue in contract on a bill of lading, and the regime of the carrier's liability under a bill of lading. The problems raised by each of these have generated changes in other jurisdictions. The first has led to a new statute in the United Kingdom governing rights to sue on bills of lading; the second to a new international liability regime which is now operative in a small number of countries. The paper concludes with brief reference to the conflict of laws implications of these changes, which may eventually have some effect on dispute resolution in Australia.

I TITLE TO SUE

The transferee of a bill of lading may require to sue the carrier for short delivery, non-delivery, damage to the goods or delay. It was established in *Lickbarrow v Mason* in 1787 that by the usage of merchants a bill of lading is a document of title transfer of which by the appropriate procedures can transfer, if such is intended by the parties, (in modern terms) constructive possession of the goods represented by the bill. This would give possessory remedies: but it was also held several times in the early nineteenth century that the right to sue on the contract of carriage was not transferred. This was

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in fact a decision in favour of the notion of privity of contract, even if the leading case now regarded as establishing that doctrine was not till *Tweddle v Atkinson* in 1861. The only way round this was to establish that the consignor had made the contract of carriage as agent for the consignee. This was an interpretation frequently adopted, and has even been adopted in a recent case on carriage by road. But it is often artificial and did not prove able to solve all the problems of title to sue.

The law was therefore altered in England by the *Bills of Lading Act* 1855, which conferred rights to sue on consignees of goods under bills of lading, and indorsees of bills of lading. The key feature of the Act was that it used the technique of linking the right to sue with the passing of property. It conferred the right to sue on consignees and indorsees 'to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement'. It also, perhaps surprisingly to modern eyes, made the consignee or indorsee *liable* on contract (eg for unpaid freight); though this was done by the use of different wording from that which transferred the benefit of contract. It is worth noting that in the United States the relevant statute, the Federal Bills of Lading Act of 1916 (the *Pomerene Act*) did not link transfer to the passage of property in the goods, and only transferred the benefit of the contract, not the burden.

The 1855 Act was enacted in one way or another in almost every common law territory outside the United States and in general appears to have been uniformly successful worldwide for more than 100 years. The linking of the transfer of the contract with the property in the goods caused few, if any problems. It is, after all, almost always the person with the property in the goods who suffers loss in respect of them, and who is in consequence the appropriate plaintiff in actions regarding them. There were however difficulties with the drafting of the Act. For example, it did not make clear to what extent the original shipper (in the sense of the original party to the contract

¹ *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep. 644

² New South Wales: *Usury, Bills of Lading and Written Memoranda Act* 1902, s.5; now *Sale of Goods Act*, s.SOA (with 'modernised' wording).

of carriage) could sue after indorsing the bill away; nor did it make clear to what extent the transferee of the bill was liable (eg in respect of damage to the ship caused by the loading of dangerous goods). The position of intermediate transferees was not mentioned either. Surprisingly, these points have not arisen for clear resolution in the last 138 years.

In England, however, more serious difficulties connected with market practices became conspicuous around the mid-1980s. They can be summarised under four heads.

(i) Bulk cargoes

The dramatic increase in the size of ships and cargoes in the post-war years led to the result that in the commodity trades bills of lading were more frequently issued for parts of a bulk than had previously been the case; and also that delivery orders were more frequently issued for parts of the amount represented by a bill of lading. Some of these latter are issued by shore agencies to whom the bill of lading has been indorsed, and only operate after discharge of the goods from the ship (so-called 'merchant's D/Os'); these raise legal problems, but not directly in connection with carriage by sea. Others are however issued, on request of a bill of lading holder, by the carrier ('ship's D/Os'); they create rights of some sort, whether in bailment or by estoppel or both, against the carrier.

Bills of lading in respect of parts of a bulk were affected by the rule in the *Sale of Goods Act* that property cannot pass in an unascertained part of a bulk. It was arguable that the property in part of a bulk represented by a bill of lading did not pass, as the 1855 Act requires, by consignment of the goods or indorsement of the bill of lading, but rather by measuring out on delivery, with the result that the Act was ineffective to transfer the contract. Attention was drawn to the problem by a Dutch decision of 1985, *The Gosforth*, which dealt with holders of *merchant's* delivery orders for parts of a bulk shipment, who were all postponed to the unpaid vendor of their own

3 New South Wales: *Sale of Goods Act*, s.21.

vendor. The Dutch judge suggested that under English law, because of the bulk goods rule, the buyers would have been no better off had they had bills of lading. This caused a stir in commodity circles, where contracts are regularly governed by English law and arbitrated in London.

Ship's delivery orders are not bills of lading at all, and the 1855 Act was inapplicable. So even if the problems about bulk goods could be circumvented, there was nothing to transfer contract rights in respect of such documents (other than some form of assignment or attornment). Since their use had increased (as had that of other delivery orders and warrants used in warehousing) special problems had become prominent in this connection also.

Although the particular problem of bulk goods was what started off the train of events, it was actually solved by Mustill LJ in *The Delfini*, where, following dicta of his own in the earlier case of *The Elajr* he suggested that the Act applied so long as the indorsement of the bill played an 'essential causal part' in the transfer of property — which in the case of bulk goods it does, since a particular parcel can normally only be claimed with the aid of a bill of lading.

(ii) Delivery orders

Despite this line of reasoning, no action would still lie on the contract of carriage where the document used in respect of part of a bulk was not a bill of lading at all, but rather a delivery order used to split a bill of lading quantity, even though it was a ship's delivery order.

(iii) Property passes separately from dealings with a bill of lading

Furthermore, there remained the possibility of cases where it could not be said that the bill of lading played any part in the transfer of the goods at all. A minor example occurred in the famous case of *The Aliakmon*,⁷ where the buyer could not pay for the goods against the bill of lading, and it was arranged that the buyer should land them

4 See Davenport, [1986] LMCLQ 4.

5 [1990] 1 Lloyd's Rep. 352.

6 [1981] 2 Lloyd's Rep. 679.

7 [1986] AC 785.

as agent of the seller and resell them as agent of the seller (rather as under a *Romalpa* clause). The goods arrived damaged and the buyer was unable to rely on the Act as against the carrier. This may have been an unusual situation. But major problems surfaced in the area of commodity trading, where the documents are often passed down lines of sellers and buyers and become detached from the goods; the goods are landed and delivered under an indemnity and the bill of lading follows later. In the decision which triggered off the strongest pressure for reform, *The Delfini*, already referred to, the English Court of Appeal dealt with a claim in respect of a short sea transit from Algeria to Sicily where the documents arrived some time after the goods (oil) had been physically delivered from the ship against an indemnity. It was held that the property had passed by the delivery of the goods independently of the bill of lading, and that the ultimate holder could not sue for short delivery.

Sometimes such problems can be circumvented by the detection of an implied contract between the presenter of the bill of lading or delivery order and the carrier, that the carrier will deliver on bill of lading terms (the so-called *Brandt v Liverpool* contract). There may be difficulties in finding consideration for such a contract unless there are outstanding charges for the presenter to pay. But in *The Aramis* the English Court of Appeal largely closed that door by saying that there was no evidence of contractual intent from the mere presentation of a bill and delivery of the goods under it.

These shortcomings in respect of contract claims led to experiments with actions in tort. These are beyond the scope of this paper, but they have raised, in Australia as well as in England, problems of title to sue in negligence and of the applicability of the contractual exclusions to tort claims. Such problems have led further to fundamental explorations of the law of bailment.

8 So-called after *Brandt v Liverpool, &c, S. N. Co.* [1924] 1 KB 575 (by no means, however, the first case: the reasoning goes back to the nineteenth century).

9 [1989] 1 Lloyd's Rep. 213.

10 See, for example, *The Captain Gregos (No. 2)* [1990] 2 Lloyd's Rep. 395; such arguments were also deployed at first instance in *The Cape Comorin* (1991) 24 NSWLR 745.

(iv) Non-negotiable waybills

One further problem was perceived as requiring a remedy: the Act did not apply to, and so there was no action for the consignee on, non-negotiable waybills. These are of course documents covering sea carriage which are specifically not intended to be documents of title and so not bills of lading. Here there was pressure from the CMI's committee on waybills, which was trying to draw up internationally agreed rules for these documents. It was much impeded by the fact that in at least some common law territories, including England, the consignee under a waybill had no contractual right of action against the carrier (except conceivably, again, under a *Brandt v Liverpool* contract).

The New UK Act¹¹

The new United Kingdom *Carriage of Goods by Sea Act* of 1924, which came into effect on 16 September of that year, seeks to deal with these problems by the following technique. It vests the right of action in the 'lawful holder' of the bill of lading regardless of the property in the goods, and, lest there be any difficulty caused by the fact that someone other than the holder actually suffers the loss in respect of the goods (eg where the bill is indorsed to a freight forwarder for collection) makes clear that a lawful holder can recover damages on behalf of the person actually on risk.

It does not however initially impose on the holder the liabilities under the bill of lading. The principal reason for this was that to do so would impose liabilities on banks holding bills as pledges under the letter of credit system, which was not thought appropriate unless the bank claimed the goods. Under the previous regime the bank was not liable in such a situation, because it did not by consignment or indorsement to it acquire property in the goods, only a security interest;¹³ though if it sought delivery of the goods it might become

11 There is a commentary on the Act (as a Bill) by Mr J. Beatson, the English Law Commissioner responsible for much of the Act and its passing, and Mr J. J. Cooper, the civil servant primarily assigned to the project, in [1991] LMCLQ196. The earlier stages had been the responsibility of Mr Brian Davenport, QC.

12 s.2.

13 *Sewell v Burdick* (1884) 10 App. Cas. 74.

liable under a *Brandt v Liverpool* contract. The removal of the 'property' criterion would therefore have exposed banks, as lawful holders, to automatic liabilities as well as conferring rights. It is provided at a later point in the Act¹⁴ 'that a holder who takes or demands delivery becomes liable thereby' and this would of course apply to banks; the wording may actually put them on slightly more risk of liability on the contract of carriage (eg for freight) than their previous exposure.

The Act contains other provisions of a technical nature. One seeks to prevent actions on bills of lading transferred after they are spent; though it does not make clear exactly at what point the bill is actually spent. Another removes definitively the old rule in *Grant v Norway*, under which the master's signature on a bill of lading for goods not shipped does not bind the carrier: this was probably already dispatched by the Visby Rules, but not certainly.

Finally, in response to the pressures mentioned above, the benefits of the Act are extended, with slight variations, to ship's delivery orders and non-negotiable waybills.

Prospects for reform

Should some similar sort of reform be adopted elsewhere? When the general problems were mooted at the Commonwealth Law Conference in Auckland in 1990, it was suggested (principally by a Nigerian delegate) that the problems which made such reform necessary were largely those of a jurisdiction which was a substantial commodity importer (as opposed to exporter), and, more importantly, handles much international arbitration and litigation concerning commodities even though the facts have no connection with the United Kingdom. For instance, a leading English case on general contract

14 s.3.

15 It is not clear that *Sewell v Burdick* itself would be decided in the same way under new Act.

16 s.2(2).

17 As to which see *The Future Express* [1992] 2 Lloyd's Rep. 79.

18 s.4.

19 s.2(1)(3).

law concerns American citrus pulp pellets shipped from the United States to Rotterdam and sold by a German seller to a Dutch buyer. On this basis it may be that the particular problems arising out of dealings with bills of lading and delivery orders (which appear to be traded among commodity dealers) do not arise in Australia with sufficient frequency to make reform of the 1855 legislation a matter of any importance. Indeed, it is sometimes argued that bills of lading for single liner consignments will soon be replaced by electronic systems (EDI) with the result that bills of lading will only remain in commodity trades.

On the other hand it may be that non-negotiable waybills are or will be used in this part of the world, and that such use may increase, with the result that legislation conferring rights of action in respect of them would be preferable to trying to get such a right of action established at common law under the rubric of the *Trident* case. It is usually thought preferable to deal with bills of lading by special provisions rather than rely on general principles of law regarding third party contracts.

It may also be that consideration should be given to the question whether and when there should be rights of action on freight forwarders' bills of lading. The United Kingdom Act makes no reference to these; it was thought that to investigate and solve this (which would require a definition of the notion of a bill of lading) among other topics would delay the legislation unacceptably. It is clear that the question whether they are bills of lading remains controversial. No more is said there, as that is the subject of another paper.

II THE REGIME GOVERNING THE CARRIER'S LIABILITY

The Hague Rules

An international set of rules governing many aspects of the carrier's liability was adopted at Brussels in 1924; these rules are known as

20 The Hansa Nord [1976] QB 44.

21 (1988) 165 CLR107.

the Hague Rules because they originated from a conference at The Hague in 1921. They represent a compromise attempt to control the terms on which goods are carried by sea, caused by the prevalence of very wide exemptions used by carriers (especially British) in the late 19th century. The compromise was based on that adopted by the American *Harter Act* of 1893 (100 years ago). As is well known, its outline is as follows. The carrier cannot contract out of a duty to use due diligence (not strict liability) in the furnishing of a seaworthy and cargoworthy ship; in return the carrier is not liable in respect of a number of excepted perils, of which the most conspicuous are negligence in navigation and management of the ship and fire unless caused with the actual fault of privity of the carrier. Of these the first, negligence in navigation and management of the ship, is the most important. There is a further important part of the regime: the carrier's liability is limited to a specific sum per package or unit, and actions against (but not actions by) the carrier are barred in a special period of one year.

The Hague-Visby Rules

A protocol was added to the rules at Brussels in 1968; it is often referred to as the Visby Protocol, and the rules as amended by the Protocol are referred to as the Hague-Visby Rules. These came into effect in Australia on 1 November 1991 by virtue of the *Carriage of Goods by Sea Act* (Cth) of that year.

The Protocol does no more than make a few amendments to the Hague Rules at points where they were perceived as giving trouble. The principal changes concern the application of the Rules to bulk cargo not shipped in packages or units (where there was prima facie no limitation at all: the amendment introduced a new limit by kilogram of gross weight) and to containers (where the problem could arise as to whether the container was a package:²⁴ the amend-

²² Article 4.5(a).

²³ Article 4.5(c).

²⁴ See the illuminating judgment on this point by Carruthers J at first instance in *Chellaram v Ocean Shipping Co.* [1989] 1 Lloyd's Rep. 413 (further proceedings, [1991] 1 Lloyd's Rep. 493).

ment makes this turn on the way in which the bill of lading is made out); and the privity of contract question as to whether the Rules applied to claims in tort against subcontractors²⁵ (where the solution adopted is incomplete and thus not entirely satisfactory).²⁶ The basis of calculation of the unit of limitation (which had been stated in 1924 in pounds sterling) was also changed in order to deal with problems of inflation; it was subsequently changed again to link the limitation to Special Drawing Rights on the International Monetary Fund.

These reforms were not radical, originated in meetings of the CMI and were perceived in third world circles as being in the interests of carriers. The whole framework of the Hague and Hague-Visby Regime was also perceived as being in the interests of developed countries, who provide most of the carriage and insurance. It was and is thought by some that there is no reason for the 'management and navigation' exception; that the split of risk between shipper and carrier is productive of difficulties which result in unsatisfactory litigation; that the unit limitation may be too low; and that there is no reason why the carrier alone should enjoy a short limitation period. It is said that all this causes substantial overlap of insurance, in that the shipper has to insure in respect of risks which are really to be attributed to the carrier, and freight rates do not nevertheless diminish overall.

The Hamburg Rules

Pressures of this sort led to the adoption of a totally different regime at Hamburg in 1978, the 'Hamburg Rules'. They required 20 ratifications to come into operation and recently obtained enough ratifications to do so. Many of the ratifying countries are of little international importance in the maritime and international trade scene: the most significant countries in this sense to have ratified are Nigeria and some of the East African countries. The *Carriage of Goods by Sea Act* 1991 (Cth) contains provisions for triggering off the rules for Australia.

²⁵ Article 4 bis.

²⁶ See *The Captain Gregos (No. 1)* [1990] 1 Lloyd's Rep. 310.

The basic regime of the Hamburg Rules involves placing most liability on the carrier unless it can be proved that the carrier, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. There is a special exception, framed in a way inconsistent with the scheme of the Rules, for fire; and one for live animals. The Rules contain also provisions dealing with other problems which have arisen under the Hague Rules; in particular they attempt to define the operations to which they apply (the 'before and after' problem), delay (not dealt with by the Hague Rules), and the use by carriers of invalid clauses. Most significantly at present for lawyers in non-Hamburg Rules countries, they provide for the places where arbitration and litigation may take place, and include among them the place of discharge of the goods. As under the Hague Rules, these provisions cannot be excluded (except to increase the carrier's liability).

They also seek to deal with problems of subcontracting, as is done in the area of air carriage, by providing (though not quite in the same way) not only for the position of the 'contracting carrier', but also for that of the 'actual carrier'. These provisions are certainly relevant to the problem of the freight forwarder. They do not however solve all the difficulties, and indeed generate some of their own.

Prospects for reform

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Should these rules be adopted? They are intended to redress a supposed adverse balance so as to improve the position of cargo as against carrier, which is relevant to a country which is principally cargo-owning as opposed to shipowning. They will certainly create new problems of their own, for example as to when the goods are in the charge of the carrier and as to actual carriers and other subcontracting problems. It is true that the main problems of the Hague Rules have now been sorted out, though not to the same effect in all

27 See a valuable article by Ramberg, 'The vanishing bill of lading and the Hamburg Rules carrier' (1979) 27 Am. J. Comp. Law 391.

28 There is a useful collection of articles on the Hamburg Rules and their adoption in the issue of the *Journal of Maritime Law and Commerce* for January 1993.

jurisdictions. However, the Hague Rules did not themselves yield a large number of uncertainties, despite gloomy predictions at the time of their adoption: so it seems reasonable to assume that it will be possible to cope with those under the new rules.

As a matter of pure law, the main question must in any case be whether the *present* (Hague-Visby) rules yield satisfactory results. How important is it to retain the management and navigation exception? It may be that an error in navigation makes it likely that the ship has an incompetent captain and/or crew and so is unseaworthy. But there are other, political questions involved in the decision whether to adopt the rules, in particular, the impact on the insurance industry. There is also an international political question: if a number of states with strong maritime and commercial activity adopted the rules, with the result that they began to apply to a good proportion of international sea transport, there would (as in the case of the Vienna Convention on international sales) be strong reasons for following suit.

III WILL AUSTRALIAN PRACTITIONERS NEED TO TAKE ACCOUNT OF THE UK ACT OF 1992 OR THE HAMBURG RULES AT THE PRESENT TIME?

(i) The UK Act of 1992

The Act obviously applies in the United Kingdom. It also appears to apply of its own motion in Singapore, where section 5 of the *Civil Law Act* applies the current English law in specified commercial areas where there is no specific local law. It has been enacted in Hong Kong. There is a bill to enact it in New Zealand in virtually identical terms, though the order of the provisions is altered. Obviously, other common law territories (eg India) could adopt something similar. The example of New Zealand again shows that even common law territories which specifically allow third party rights on contracts (the *Contracts (Privity) Act*) there is a preference for dealing with bills of lading and similar documents by statute: this was so also in the United States.

Whether this will affect Australian practitioners directly depends on the conflict of laws status of the 1992 Act. This was deliberately not dealt with by those responsible for the Act because of the difficulty of solving the questions raised, which, like those of freight forwarder's bills of lading, could have delayed the preparation of legislation unacceptably.

So one turns to the 1855 Act. There seems to be virtually no authority on it. *Scrutton on Charterparties*²⁹ suggests that it was a rule of the forum, applicable to all litigation before English courts; no doubt this may have been thought appropriate in the nineteenth century, when problems of the conflict of laws were not often taken into account, but it seems difficult to justify now and the authority cited gives only marginal support.

If the 1855 Act, as enacted in Australia, lays down a rule of procedure, or an overriding statute of the forum applicable whatever the law governing the contract, Australian courts will obviously apply it to all disputes before them, regardless of the law governing the bill of lading. By the same token, they will not apply the 1992 Act as enacted in other countries.

If however it is a rule of substance of the law governing the contract, the same will probably be true of the 1992 Act, and thus the 1992 rules for transfer of the right of action, and for liabilities of the holder of the bill, will be governed by the law governing the contract contained in the bill of lading, which may obviously in some cases be the law of England, Singapore, Hong Kong or New Zealand. Should a dispute arise over title to sue on such a bill, it would be necessary to apply the provisions of the UK Act, or its equivalent.³⁰ The result may well be benevolent, in removing possible technical problems regarding title to sue, but there may be slight differences of result in contract with that reached by the existing law, and the possibility of this should be noted.

It may be that disputes in respect of bills of lading similar to the commodity-based disputes which have in England raised questions

29 18th ed. (1984) p.26, n.23A.

30 *Sewell v Burdick* (1884) 10 App. Cas. 74 at pp.85,104.

of title to sue will not often occur in Australia. But disputes connected with the use of non-negotiable waybills could perhaps more easily arise. In such a case it may be that the law governing the contract contained in the document could confer a right of action, and also sometimes impose a liability, on the consignee who seeks delivery under such a document. This result may again be benevolent, but it may also be a surprise.

(ii) The Hamburg Rules

All *outgoing* bills of lading from Australia are governed by the laws in force at the place of shipment (section 11(1) of the *Carriage of Goods by Sea Act* 1991 (Cth), repeating earlier legislation). This section provides a choice of law rule. Before an Australian court, therefore, the law of the place of shipment in Australia, including the Hague-Visby Rules, would at present be applicable to such a bill of lading, whatever would be its proper law if this had to be ascertained by other means. This would be so, therefore, even if the bill specified that it was governed by the law of a Hamburg Rules country (eg Tanzania, Kenya, Nigeria): the choice of law would simply be nullified.

This might also be so even if the bill specifically purported to incorporate the Hamburg Rules. For any provision of those rules which is contrary to the Hague-Visby Rules in that it reduces the carrier's liability beyond what the latter rules require would be void before an Australian court by virtue of Article III.8 of the Hague-Visby Rules; and indeed it is possible that the whole stipulation invoking the Hamburg Rules would be void, because in some respects these could be regarded as more favourable to the carrier than the Hague and Hague-Visby regimes, such a result is not likely; but it is possible. Alternatively, the Hamburg Rules might be held to *increase* the carrier's liability: on this basis their incorporation could be valid.

The same results will apply, by virtue of sections 11(1)(b) and 10(1)(b)(iii) of the 1991 Act, in respect of some forms of non-nego-

31 Cf *Ocean SS Co. Ltd v Queensland State Wheat Board* [1941] 1 KB 402.

liable waybill if these are used on ex-Australia shipments. The importance of this seems to depend on what interpretation Australian courts give to the words 'contains express provision to the effect that the amended Hague Rules are to govern the contract as if the document were a bill of lading'.

However, the Hamburg Rules confer jurisdiction on, among other courts, the courts of the place of discharge; and they apply, *inter alia*, where the port of discharge is located in a contracting state.³³ So if the carriage was from Australia to a Hamburg Rules country (eg Tanzania, Kenya or Nigeria), the local court would, by virtue of the rules as adopted into its own law have jurisdiction over disputes on the bill of lading, accompanied no doubt by the right to arrest the ship. Australian courts themselves claim jurisdiction over incoming bills of lading by virtue of section 11(2) of the 1991 Act and so need not be surprised at this. But no Australian provision subjects such incoming bills of lading to the *law* of the place of *discharge*. Before the court in a Hamburg Rules country, however, the rules are likely to be compulsorily applicable to inward as well as outward carriage. On this basis, some of the provisions of the Hague-Visby Rules certainly involve a lower liability of the carrier than the Hamburg Rules and might be void; indeed an invocation of the Hague-Visby Rules might of itself be void. One country does not apply the policy of another: there would be no case for a Nigerian court to apply the Australian Act on choice of law. So, while any underlying choice of law ascertained on *general* grounds (ie without the aid of the Australian statute) would probably still be valid, the 'overlay' of the Hamburg Rules could mean that litigation in such a country on an Australian bill of lading (to use the term loosely) — or even one governed by English or some other foreign law under which the Hague-Visby Rules would apply — might lead to results very dif-

32 A very limited interpretation has been adopted in England: see *The European Enterprise* [1989] 2 Lloyd's Rep. 185.

33 Articles 2,21.

34 But the situation might be otherwise if the Act was incorporated by reference: see *The Amazonia* [1990] 1 Lloyd's Rep. 236, recently doubted in the NSW Court of Appeal in *The Krasnogorsk* (1993) 31 NSWLR145.

ferent to those which would apply in Australia, the country of shipment. Or, if the *results* in the foreign country were not different, they might be reached by the use of substantially different *reasoning* from that which would apply here.

An *incoming* bill of lading to Australia subject to the Hamburg Rules, whether because governed by the law of a Hamburg Rules country or because the rules are specifically incorporated into it, would not be affected by the Australian Act except, by virtue of section 11(2) of the 1991 Act, in respect of jurisdiction: the terms of the bill of lading could not deprive the Australian courts of jurisdiction.

This is of little significance, in that the Hamburg Rules themselves permit jurisdiction in the country of discharge. Subject to this, the regime of the rules will apply before an Australian court: it will obviously be unfamiliar to a practitioner at present.

If however the shipment to Australia is out of a Hamburg Rules country, but the bill of lading is expressed to be governed by *another* law, whether of one of the Australian states or of some other non-Hamburg country, the courts of the country of shipment would probably apply the Hamburg Rules nevertheless. The question will then arise as to whether the Australian court seised of the dispute on the bill should apply the Hamburg Rules as applicable by a statute in force at the port of shipment despite the applicability of another proper law. On the present case law, the law chosen should apply and the Hamburg Rules provisions of the country of shipment should not.

These suggestions are based on general principle only; much will depend on the way in which the Hamburg Rules are brought into operation in the country concerned. The complexities suggested are probably not yet likely to arise often; but it will be necessary to keep a close eye on the list of countries which adhere to the Hamburg Rules.

35 *Vita Food Products Inc. V Unus Shipping Ltd* [1939] AC 277; see also the *Chellaram* case, above, n.22.