

# A COMPARISON OF THE LEGAL REGULATION OF CARRIAGE OF GOODS BY SEA UNDER BILLS OF LADING IN AUSTRALIA AND GERMANY

Ralph Ashton \*

## I INTRODUCTION

A large percentage of international trade between Australia and Germany is undertaken by way of cargo carried under bills of lading. This article examines the differences and similarities which exist between the legal regulation of carriage of goods by sea under bills of lading in these two jurisdictions.

It is impossible to discuss in this article the very important primary normative question of whether different national courts should *ever* come to different results when interpreting international commercial treaties. The fact is that there are differences. This is significant because, in certain circumstances, Australian courts must apply German law and vice versa. Carriage of goods by sea between the two countries is one instance when such circumstances can exist. For example, carriage of goods by sea from Germany for receipt in Australia will often be governed by the Hague-Visby Rules under a bill of lading the proper law of which is German law. In disputes concerning these bills

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\* Blake Dawson Waldron, Lawyers, Sydney. Opinions expressed in this article do not necessarily represent the opinions of Blake Dawson Waldron. The author thanks Professor Martin Davies and Mr Murray Raff of the University of Melbourne, Professor Doctor Rainer Lagoni, Professor Doctor Marian Paschke and Frau Kade of the Institut für Seerecht und Seehandelsrecht at the Universität Hamburg, Professor Doctor Rolf Herber, the Max-Planck-Institut für Ausländisches und Internationales Privatrecht in Hamburg and Doctor Hans-Jürgen Puttfarcken of the Max-Planck-Institut.

Unless otherwise stated, translations of German legislation and literature are the author's, "sections" refer to sections of the Carriage of Goods by Sea Act 1991 (Cth) (COGSA), "Articles" refer to Articles of the Hague-Visby Rules as they appear in COGSA, and paragraphs (§) refer to paragraphs of the *Handelsgesetzbuch* (HGB – Commercial Code).

litigated in Australia, the Australian court must apply German law. The same holds for carriage of goods by sea from Australia to Germany, which will often be under a bill of lading governed by Australian law. In disputes concerning these bills litigated in Germany, the German court must apply Australian law. The Australian court will assume that German law is the same as Australian law unless proved otherwise. The German court will discover for itself what Australian law is. In some cases, Australian and German laws come to substantially different results when applying the law relating to bills of lading. This will obviously affect the relative legal positions of the litigating parties. It is important that the parties and courts know where the two laws deviate.<sup>1</sup>

## II BILLS OF LADING

### A Australia

#### 1 Functions of the Bill of Lading

Under Anglo-Australian law, the bill of lading performs three distinct functions: evidence of receipt of the goods by the carrier; evidence of

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<sup>1</sup> The broader comparative differences between the legal systems fall beyond the scope of this article. It should be noted, however, that German law is a codified system. Judges in Germany are bound by these codes or *Gesetzbücher*. They must interpret the codes and fill in the gaps where they are silent. Although not bound by the doctrine of precedent, German judges tend to follow previous decisions, especially those of higher courts. Despite the fact that judge-made law cannot be seen as a true source of German law, it is an important aid in understanding the meaning of the codes: see K Larenz *Methodenlehre der Rechtswissenschaft* (6 ed, 1991) 432; M-L Hsu *Haftungsprobleme beim Containerseeverkehr im Seefrachtrecht Taiwans (=Republik China) im Vergleich mit der Bundesrepublik Deutschland* (1995) 19 (hereinafter referred to as Hsu). However, the dominant academic opinion or *herrschende Meinung* (and criticisms of it) is often more important than the decisions themselves. The main reason for this is that judges are influenced by academic opinion. As far as German maritime law is concerned, there is an additional reason: German maritime law has only a small and haphazard library of case law, whereas the academic opinion is both more detailed and more expansive. Reference will be made to the leading German academic texts throughout this article.

the contract of carriage between the shipper and the carrier;<sup>2</sup> and negotiable document of title.<sup>3</sup>

## 2 Transfer of Title to the Goods

It is said that one role of the bill of lading is to be a document of title. At common law in Australia, a person who possesses the bill of lading is entitled to possession of the goods. However, the mere possession of the bill of lading does not *prove* title to the goods. The holder of the bill must show also that the transferor had good title and that the transferor and transferee intended that title in the goods should pass with the transfer of the bill.<sup>4</sup>

## 3 Negotiability and Transfer of the Contract of Carriage

At common law, the only parties to the contract evidenced by the bill of lading are the shipper and the carrier. In most cases, the goods are to be delivered to a consignee or endorsee who gains title to the goods by possessing the bill of lading, but who is not a party to the contract of carriage in the bill of lading. This position is modified by various pieces of legislation in Australia<sup>5</sup> so that the consignee or endorsee, where title has passed “upon or by reason of” the consignment or endorsement, is taken to have contracted with the carrier on the same terms as those found in the bill of lading. This is where the bill of lading is an important piece of evidence. The shipper remains under its obligations to the carrier. The legislation fails to circumvent the obstacle of privity

<sup>2</sup> Under Australian law, the bill of lading is treated as the contract of carriage in most cases, although it can be shown through evidence that the terms of the contract are different from those recorded in the bill of lading. This can be the case where there is a term buried in fine print which is “surprising” to the shipper (*Crooks v Allen* (1879) 5 QBD 38) or where there had been different prior oral arrangements (*SS Ardennes (Cargo Owners) v SS Ardennes (Owners)* [1951] 1 KB 55).

<sup>3</sup> Negotiable only if the goods are to be transferred to a consignee or endorsee at the end of the voyage.

<sup>4</sup> See M Davies & A Dickey *Shipping Law* (2 ed, 1995) 326 (hereinafter D & D).

<sup>5</sup> Sales of Goods Act 1923 (NSW), Mercantile Acts 1867-1896 (Qld), Mercantile Law Act 1936 (SA), Bills of Lading Act 1958 (Tas), Goods Act 1958 (Vic), 20 Vic No 7 (WA). These pieces of legislation are incarnations of the Bills of Lading Act 1855 (UK).

of contract where title passes at some time or for some reason other than “upon or by reason of” the consignment or endorsement. This loophole has been closed by statute in England,<sup>6</sup> but not in Australia. It has been partly closed by the common law *Brandt v Liverpool* contract,<sup>7</sup> but in some cases in Australia, the loophole remains open.<sup>8</sup> The situation under German law is different (mainly because there is no doctrine of privity of contract) – the receiver is always a beneficiary of the contract and becomes bound by the contract’s obligations as soon as it accepts delivery of the goods and the shipper is at the same time released from its obligations to the carrier.

#### 4 Implementation of the Hague-Visby Rules: Carriage of Goods by Sea Act 1991 (Cth)

Section 8 COGSA provides that the Hague-Visby Rules have the force of law in Australia.<sup>9</sup> They are therefore not incorporated into the bill of lading, but instead govern (as legislation) the carriage of goods by sea under bills of lading and other similar documents of title. The Rules constitute a basic standard of obligations and rights that cannot be deviated from. Where the Rules are silent, however, the contracting parties are free (within the limits of the general law) to regulate their relationship as they decide. The Hague-Visby Rules are contained in a schedule to COGSA.

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<sup>6</sup> Carriage of Goods by Sea Act 1992 (UK).

<sup>7</sup> *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575.

<sup>8</sup> See generally D & D 314-8.

<sup>9</sup> Subject to s 10, which provides that the Hague-Visby Rules only apply to a contract for the carriage of goods by sea that: is of a kind referred to in Art 10 of the Rules; or, for intra-Australian carriage, is contained in or evidenced by a bill of lading; or is contained in or evidenced by a non-negotiable document that contains an express provision to the effect that the Rules govern the contract. The Rules do not apply to carriage of goods by sea within an Australian State or Territory. Section COGSA provides that regulations may be made to extend the application of COGSA: to a wider range of sea carriage documents (including documents in electronic form); and to contracts for the carriage of goods by sea from places in countries outside Australia to places in Australia in situations where the contracts do not incorporate, or are not subject to, the Hague Rules, Hague-Visby Rules (whether or not amended by the SDR Protocol) or Hamburg Rules. No such regulations have been made.

## B Germany

### 1 Persons Involved in the Carriage of Goods by Sea

The equivalent of the bill of lading in German law is the *Konnossement*.<sup>10</sup> Three persons are involved in the legal framework of the carriage of goods by sea under a bill of lading in Australian law – shipper, carrier and receiver. German law knows five and is more precise:<sup>11</sup> the *Verfrachter* (carrier) and *Empfänger* (receiver), who cause no problems of definition; the *Ablader*<sup>12</sup> or person who delivers the goods to the carrier either directly or indirectly through some other party (the *Ablader* can be at the same time the receiver); the *Befrachter* or person who contracts with the carrier<sup>13</sup> (the *Befrachter* can be the *Ablader* or the receiver);<sup>14</sup> and, in cases where the *Ablader* does not deliver the goods to the carrier directly, the *Drittablader*, who delivers the goods to the carrier instead. There is no exact English equivalent.<sup>15</sup> The *Ablader* and *Drittablader*, in so far as they are distinct persons in German law, are peculiar to German law – the rest of the world knows only the “shipper”. There is

<sup>10</sup> Wherever necessary, “*Konnossement*” is used in place of “bill of lading” to make clear the distinction between the two. Otherwise, the English nomenclature is used. Note also that an *Orderseefrachtbrief* (sea waybill to order) is treated as exactly the same as the *Konnossement*. For a discussion of sea waybills under German law, see H-J Puttfarcken *Seehandelsrecht* (manuscript, October 1996) 78-81 (hereinafter P) and H Prüßmann & D Rabe *Seehandelsrecht* (3 ed, 1992) 611-2 (hereinafter P & R).

<sup>11</sup> See Book 5 Section 4 of the HGB and P & R 284-7. See P 20, who criticises the terminology used in the German literature and HGB and proposes his own scheme, based on the law of forwarding.

<sup>12</sup> The *Ablader* is the person who English language texts generally call the “shipper”. However, its definition is subtler than that.

<sup>13</sup> P & R 282 translate this somewhat inaccurately as “charterer, freighter”.

<sup>14</sup> *Befrachter* is used in the rest of this article to indicate the person who has contracted with the carrier.

<sup>15</sup> The *Ablader* contracts with the *Drittablader* for this delivery from it to the carrier. The *Drittablader* in turn contracts in its own name for the carriage of the goods with the carrier. The rebuttable presumption is that the *Drittablader* is an independent contractor, and not an agent of the *Ablader*. The *Drittablader* is unique to the German legal system and is not the same as a freight forwarder.

no secret in the term “*Befrachter*”: it is simply a very precise and useful way of nominating the person who contracts with the carrier.<sup>16</sup>

## 2 Functions of the *Konnossement*

The *Konnossement* performs three distinct functions:<sup>17</sup> evidence of receipt of the goods by the carrier; evidence of the contract of carriage between the *Befrachter* and carrier;<sup>18</sup> and *Traditionspapier* (negotiable document of title).<sup>19</sup>

## 3 Negotiability and Transfer of the Contract of Carriage

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<sup>16</sup> That means that five possible combinations of persons are involved in the legal framework of the carriage of goods by sea under a *Konnossement*, namely: *Befrachter=Ablader*, carrier and receiver (the shipper contracts with the carrier and delivers the goods directly to the carrier); *Befrachter=Ablader, Drittablader*, carrier and receiver (the shipper contracts with the carrier but delivers the goods indirectly to the carrier); *Drittablader*, carrier and *Befrachter=receiver* (the receiver contracts with the carrier but the shipper delivers the goods either directly or indirectly to the carrier); *Drittablader*, carrier and *Ablader=Befrachter=receiver* (the receiver – who is also the *Ablader* – contracts with the carrier but delivers the goods indirectly to the carrier); or carrier and *Ablader=Befrachter=receiver* (the receiver – who is also the *Ablader* – contracts with the carrier and delivers the goods directly to the carrier).

<sup>17</sup> See P & R 610-11; P 56-8; W Zöllner *Wertpapierrecht* (14th ed, 1987) 5 (hereinafter Zöllner).

<sup>18</sup> The *Konnossement* usually contains the terms of the contract of carriage, but it is not the contract itself: see P 22-4. The *Befrachter* and carrier conclude a contract of carriage according to general contract law – in Germany, the BGB (see P 22-4 but cf P & R 295, who argue that, because of the special nature of the contract of carriage by sea, the general provisions of §§631ff BGB have little application in practice. See P & R 299-301 for factors that effect the validity of the contract of carriage.) That contract imposes obligations on the *Befrachter* (to pay freight) and carrier (to deliver the goods in their original condition at a certain port). The transfer of the *Konnossement* transfers the whole contract of carriage itself – see P 66, 68. This is where the *Konnossement* plays an important evidentiary role – only those provisions of the contract that have been recorded in the *Konnossement* are binding between the carrier and the new holder of the *Konnossement*. §656(4) provides that where the *Befrachter* is also the receiver, the contract of carriage alone governs the relationship between receiver and carrier.

<sup>19</sup> *Traditionspapier* is translated simply as “document of title” in C-E Dietl *Dictionary of Legal, Commercial and Political Terms* (2nd ed, 1986), but as “document of title, title deed, transferable title-conferring instrument, negotiable instrument” in D Hamblock and D Wessels *Großwörterbuch Wirtschaftsentdeutsch* (1989) (hereafter H & W).

German law has no doctrine of privity of contract. Therefore, parties may contract for the benefit of a stranger. They cannot contract to impose obligations on a stranger. However, as soon as the goods have been delivered to the legitimate bearer of the *Konnossement*, §614(1) HGB provides that that person becomes liable under the contract of carriage,<sup>20</sup> while §625 frees the *Befrachter* from its obligations. The carrier is then liable to the legitimate bearer of the *Konnossement* for lost or damaged goods.<sup>21</sup> The Australian position is different: the shipper remains under its obligations to the carrier and (because of the incomplete manner in which the doctrine of privity of contract has been dealt with) there is a possibility that the receiver does not become a party to the contract.

The rights arising out of the contract of carriage, as contained in the *Konnossement*, can be transferred.<sup>22</sup> This has no effect on the rights arising out of the ownership of the goods (proprietary rights) – this is dealt with by the *Traditionspapier* aspect of the *Konnossement*.

The *Konnossement* is a type of *Wertpapier*,<sup>23</sup> and the law relating to *Wertpapiere*<sup>24</sup> applies to the transfer of the *Konnossement*.<sup>25</sup> There are three types of *Wertpapier*: bearer, order and non-negotiable (straight).<sup>26</sup> The first two are negotiable whereas the last is not. A *Konnossement* can be in any of the three forms, but it is endorsable only if it is “to

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<sup>20</sup> Before the receiver has accepted the goods, there is no contractual relationship between the carrier and receiver because it is not possible to contract so as to burden a stranger – HOLG Hamburg Hansa 65, 309.

<sup>21</sup> See P & R 287.

<sup>22</sup> This is on account of §870 BGB, not §650 HGB – see P & R 297.

<sup>23</sup> *Wertpapier* (literally: valuable paper) has no direct English equivalent – it can be translated roughly as “instrument”. H & W translate it in the singular as “security, negotiable instrument, investment, paper, bond paper” and in the plural as “securities, stocks and shares, shares, stocks, investments”. Also see Zöllner 15; P 58.

<sup>24</sup> The applicable law includes the following provisions: §§363-365 HGB, §796 BGB, and Arts 13, 14, 16, 40 *Wechselgesetz* (WG : Bills of Exchange Law).

<sup>25</sup> See generally Zöllner 9-14 and 152.

<sup>26</sup> See P 77-8 for a summary of the non-negotiable bill of lading under German law.

order”.<sup>27</sup> Typically, a *Konnossement* is issued to order with a blank endorsement.<sup>28</sup>

A *Wertpapier* (and therefore a *Konnossement*) is transferred by endorsement and physical transfer.<sup>29</sup> The endorsement of the *Konnossement* transfers all the rights in it, including the right to delivery and any right to sue the carrier for loss or damage of the goods.<sup>30</sup> It does not transfer obligations,<sup>31</sup> or non-contractual rights,<sup>32</sup> or the property rights to the goods.<sup>33</sup>

Every link in the chain of endorsement must be legitimate. If a link is not legitimate, no rights are transferred to the new holder of the *Konnossement*. However, the position of the bone fide third party acting in good faith without knowledge of the defect in the chain of endorsement is more secure under German maritime law than under the German *Civil Code* (BGB). §365(1) HGB, read with Art 16 WG, provides that such a third party can legitimately inherit the contractual rights under a *Konnossement* despite a defect in it.<sup>34</sup>

#### 4 Transfer of Title to the Goods

§650 HGB provides that the *Konnossement* is also a *Traditionspapier*. Therefore, the transfer of the *Konnossement* to the legitimate receiver (as stipulated in the *Konnossement*) of the goods has, as soon as the goods are in the control of the captain or other representative of the carrier, the

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<sup>27</sup> §363 HGB. §363(2) HGB provides that bills of lading to order may be endorsed. §364 explains the effect of endorsement. §365(1) regulates the form of endorsement.

<sup>28</sup> P & R 641. According to P 50, this makes it, to all intents and purposes, a bearer instrument. A bearer instrument gives rise to a presumption that the bearer is entitled to bear the instrument, and the receiver must accept it.

<sup>29</sup> §363(1)1 and (2) and §364(1) HGB.

<sup>30</sup> BGHZ 25, 250 (“Aspirator”) and see P & R 610 and 644.

<sup>31</sup> BGH VersR 74, 776 (“Taboa”) and HOLG Hamburg Hansa 65, 309.

<sup>32</sup> BGHZ 25, 250 (“Aspirator”), BGH VersR 71, 623, HOLG Bremen Hansa 61, 977, HOLG Hamburg VersR 67, 1173 and see P & R 644.

<sup>33</sup> This is done by the *Traditionspapier* aspect under §650 HGB.

<sup>34</sup> See P 62.

same legal effect as the transfer of the goods themselves.<sup>35</sup> In other words, the transfer of the *Konnossement* transfers to the new holder all of the proprietary rights arising out of ownership of the goods.<sup>36</sup>

The combined effect of endorsement of the *Konnossement* (in accordance with the law of *Wertpapiere*) and §650 HGB is that the new holder of the *Konnossement* receives all the contractual, tortious and proprietary rights found in the *Konnossement*.

## 5 Implementation of the Hague-Visby Rules: *Handelsgesetzbuch* (HGB)

The carriage of goods by sea is regulated under German law mainly by Book 5 Section 4 (§§556-663b) of the present HGB.<sup>37</sup> The German Reich ratified the Hague Rules in 1939.<sup>38</sup> These Rules were reformulated into the HGB in 1937.<sup>39</sup> They therefore bear little resemblance to the original treaty in terms of structure, but the effect of the HGB is basically the same as the Hague Rules. Germany has not

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<sup>35</sup> This is true of all three types of *Konnossement*. However, as far as straight bills of lading are concerned, it holds only where the receiver is the person named in the bill of lading: see *Zöllner*, 153.

<sup>36</sup> See P & R 503-4, 653-5; P 58.

<sup>37</sup> Between 1949 and 1990, Germany existed as two nations – the German Democratic Republic (GDR) in the East and the Federal Republic of Germany (FRG) in the West. At unification in 1990, the FRG effectively subsumed the GDR and the laws of the FRG replaced those of the GDR. Therefore, the present law in the whole of Germany depends only on the history of the law of the FRG: see R. Herber “Internationale Transportübereinkommen und deutsche Einheit” (1990) *Transportrecht* 251.

<sup>38</sup> RGBI II 1049 (1939). According to Art 59 II of the *Grundgesetz* (Basic Law), international treaties must be enacted as domestic legislation (ie transformed) to have any effect in German domestic law: Maunz, Dürig & Herzog *Grundgesetz, Kommentar* (1993) 11. Transformation can be effected by simply enacting a law that states that the treaty is part of domestic law – the treaty itself need not be appended to the law. Once transformed, the treaty has the same ranking as any other piece of legislation and the notion of parliamentary sovereignty applies, so that a later statute can override the treaty: Hsu 15-16.

<sup>39</sup> RGBI I 891. The HGB was amended again in 1972 (BGBl I 966) but this had little ramification for bills of lading.

ratified the Visby Protocol.<sup>40</sup> Despite this, the HGB was amended in 1986<sup>41</sup> to incorporate the Visby Protocol. As with the HGB's version of the Hague Rules, its version of the Hague-Visby Rules bears little resemblance to the original treaty in terms of structure. To all practical intents and purposes, however, Germany is a party to the Hague-Visby Rules.<sup>42</sup>

As in Australia, the provisions of the HGB are not incorporated into the bill of lading, but instead apply by force of law to the carriage of goods by sea under bills of lading. §662 HGB provides that, where a bill of lading has been issued,<sup>43</sup> the parties to the bill of lading cannot contract out of certain paragraphs of the HGB.<sup>44</sup> Those paragraphs are: §559 (sea- and cargoworthiness); §563(2) and §§606-608 (liability for loss or damage); §§611 and 612 (written notice of damage, and time bar); §656 (evidentiary presumption of the bill of lading); §§658 and 659 (restitution of value for lost or damaged goods); and §660 (limitation amount).

These provisions constitute a basic standard of obligations and rights that cannot be deviated from.<sup>45</sup> Where the HGB is silent or does not apply mandatorily, however, the contracting parties are free (within

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<sup>40</sup> Mainly for the political reason that it hosted the conference that drew up the Hamburg Rules and does not want to be seen as supporting the old, carrier-friendly Hague-Visby Rules in preference to the new Hamburg Rules: Hsu 16.

<sup>41</sup> BGBl I 1120.

<sup>42</sup> Hsu 16. See P 91 for a summary of the history of the Hague-Visby Rules in Germany.

<sup>43</sup> This does not apply when a bill of lading should have been, but was in fact not issued: A Hoffmann, *Die Haftung des Verfrachters nach deutschem Seefrachtrecht* (1996) 219 (hereinafter Hoffmann). Nor does it apply when a charterparty has been issued.

<sup>44</sup> §662 provides that certain provisions of the HGB apply compulsorily to the *bill of lading*. These provisions do not apply compulsorily to the *contract of carriage*. Therefore, depending on which document is interpreted, two different determinations of liability can be reached. §656(1) provides that the bill of lading governs the legal relationship between the carrier and legitimate receiver independently of the contract of carriage. On the other hand, §656(4) provides that, in the relationship between *Befrachter* and carrier, the contract of carriage has precedence over the bill of lading. Where the bill of lading is in the hands of a bona fide third party acting in good faith, the carrier is liable to that person under the bill of lading, not the contract of carriage. The result may be that the carrier is liable to one extent to the *Befrachter* and to another extent to the receiver (when that party is not also the *Befrachter*). See P 56-9.

<sup>45</sup> See P 94.

the limits of the general law) to regulate their relationship as they decide.<sup>46</sup>

### III Conflict of Laws

#### A *Australia*

Australian conflicts rules require that, where the proper law of a contract is not the law of the forum, the Australian court must apply the proper law. The proper law to be applied includes only the substantive law of that jurisdiction and not its procedural rules.<sup>47</sup> Where contracts specifically or inferentially choose the law of country A as their proper law, “the whole of the law in force in country A with respect to ... *local contracts*”<sup>48</sup> governs the contract so that the proper law of the contract is the “internal law of that country, excluding any renvoi.”<sup>49</sup> In the case where there is an Australian receiver of goods carried by sea under a bill of lading, and the proper law of the bill is German law, it follows that the Australian court must apply German substantive law to the dispute relating to the bill of lading.

#### 1 Choice of Law and Jurisdiction

Section 11(1) COGSA provides that parties to a bill of lading or a similar document of title for carriage of goods by sea *from* an Australian port; or a non-negotiable document that contains an express provision to the effect that the Hague-Visby Rules govern the contract as if it were a bill of lading, are taken to have contracted according to the laws of the place of shipment.

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<sup>46</sup> For examples of restrictions on parties’ freedom of contract, see P 25-6.

<sup>47</sup> *Breavington v Godleman* (1988-89) 169 CLR 41; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1. As to the substance/procedure distinction, see also *Stevens v Head* (1992) 176 CLR 433; *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463.

<sup>48</sup> *Barcelo v Electrolytic Zinc* (1932) 48 CLR 391, 437-8 (emphasis added).

<sup>49</sup> P Nygh *Conflict of Laws in Australia* (6 ed, 1995) 241 (hereinafter Nygh), referring to Lord Diplock in *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50, 61-2.

However, s 11(2) provides that an agreement made in Australia or elsewhere has no effect so far as it purports to limit the effect of s 11(1) or limit the jurisdiction of an Australian court in respect of the carriage of goods by sea under a bill of lading *to* an Australian port or *from* an Australian port to a port outside Australia; or a non-negotiable document that incorporates the Hague-Visby Rules.

Therefore, s 11(1) and s 11(2) have the combined effect that a bill of lading for carriage of goods by sea *to* Australia can have as its proper law the law of a country other than Australia, but the jurisdiction of the Australian courts can never be ousted by such a bill. A bill of lading *from* an Australian port must have Australian law as its proper law and the jurisdiction of the Australian courts can never be ousted by it.<sup>50</sup> Section 11(3) provides that an agreement, or a provision of an agreement, that provides for the resolution of a dispute by arbitration is not made ineffective by s 11(2) COGSA (despite the fact that it may preclude or limit the jurisdiction of a court) if, under the agreement or provision, the arbitration must be conducted in Australia.<sup>51</sup>

## 2 Real Conflict

Even where s 11 means that an Australian court will apply German law to a bill of lading, the proper law of which is German law, a further conflicts problem arises: there needs to be a “real” conflict between the laws of the possible jurisdictions before the Australian court will apply the other jurisdiction’s law. If the two laws that could apply are identical, the court will not enter a lengthy debate about which law will apply: it will simply apply its own law.<sup>52</sup> This is most obviously demonstrated by the case where a statute in each of the jurisdictions

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<sup>50</sup> See generally also Nygh 297.

<sup>51</sup> The effect of s 11 COGSA on arbitration clauses that do not stipulate Australia as the location for the arbitration is unclear. However, it seems that such clauses are void for carriage of goods by sea into and out of Australia. See *Kim Meller Imports Pty Ltd v Eurolevant SpA* (1986) 7 NSWLR 269 where it was held that a provision stipulating London as the place for arbitration was void because it offended s 9(2) of the Sea-Carriage of Goods Act 1924 (Cth) (essentially the same as s 11 COGSA). See also *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) FCR 211; D & D 250.

<sup>52</sup> E Sykes and M Pryles *Australian Private International Law* (3 ed, 1991), 237-40.

could apply and both statutes have identical provisions.<sup>53</sup> A different example is when the laws of the jurisdictions are different, but come to the same material result.<sup>54</sup> Another example is the common law – because of similarity in both jurisdictions – yielding the identical result in both jurisdictions.<sup>55</sup>

For the purposes of this research, the first and second of these are the only relevant scenarios. The Hague-Visby Rules are implemented by statute in both countries, but the statutory provisions are not identical in every case. Where the rules governing the bill of lading do not vary between countries, it could be argued, based on the first scenario, that there is therefore no real conflict. But this approach conveniently ignores statutory interpretation. Different interpretations are given to essentially identical legislation even in two common law countries, or in two states in the same country. It must be presumed that there will be differences, and this research shows that there are differences, between Australian and German interpretations. Where there are differences in interpretation, the Australian court must accept those differences and apply the German law.<sup>56</sup> An example of the second scenario is the rules differing in form, but reaching the same result. In that case, there is no real conflict, and the court need not apply the foreign law. The determining factor is not the text of the statute, but the result of the law as applied by the court in the jurisdiction of the statute.

### 3 Proof of Foreign Law

Finally, where the Australian court accepts that it must apply the German interpretation of the Hague-Visby Rules, it will start from the

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<sup>53</sup> *Thorn-L. & M Appliances Pty Ltd v Claudianos* [1970] Qd R 141.

<sup>54</sup> Westen “False Conflicts” (1967) 55 *California Law Review* 74, 110-112 (hereinafter Westen).

<sup>55</sup> *North Western Bank v Poynter* [1895] AC 56; *Inglis v Robertson* [1898] AC 616.

<sup>56</sup> Westen argues that there is a true conflict when the possibly applicable laws, despite being textually identical, yield different outcomes; and a false conflict only when the laws reach the same outcome. He thus supports the idea that, even where the rules applicable to bills of lading are textually identical in both jurisdictions, a real conflict can arise. This is despite the fact that the only difference between Australian law and German law will be in the *interpretation* of those rules.

assumption that there is no difference between the laws.<sup>57</sup> The party wishing to rely on the foreign law must show that there is a real conflict and prove what the foreign law is.<sup>58</sup> That proof is a proof of fact and not of law.<sup>59</sup> If there is a difficulty in this proof, the court will simply apply the Australian law instead.<sup>60</sup>

## **B Germany**

The EGBGB<sup>61</sup> contains the German private international law rules. In addition, Art 6 of the EGHGB<sup>62</sup> contains conflict of laws rules specifically for bills of lading.

### **1 Compulsory Application**

Art 6 EGHGB determines when and in so far §662 HGB (compulsory application of certain provisions of the HGB) applies. Art 6 EGHGB applies regardless of the proper law of the contract of carriage.<sup>63</sup>

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<sup>57</sup> *Standard Bank of Canada v Willey* (1919) 19 SR (NSW) 384; *Bowden Bros & Co v Imperial Marine & Transport Insurance Co* (1905) 5 SR (NSW) 614.

<sup>58</sup> *King of Spain v Machado* (1827) 4 Russ 255, 239.

<sup>59</sup> The importance of this is twofold: first, previous decisions of the courts of the forum concerning the foreign law in question are not binding (*Callwood v Callwood* [1960] AC 659) and secondly, a decision of a court of the foreign law in question is not absolute evidence of the foreign law – it has the quality only of expert evidence (*Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623, 667; but see also *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] AC 853, 923).

<sup>60</sup> See eg *Toshiba Corporation v Mitsui OSK Lines Ltd (Nichigo Maru)* (unreported, NSW SC, 22 Nov 1991); *Standard Bank of Canada and Bowden Bros*, *supra* n 57; Nygh 266-73.

<sup>61</sup> *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Law to the Civil Code).

<sup>62</sup> *Einführungsgesetz zum Handelsgesetzbuch* (Introductory Law to the Commercial Code).

<sup>63</sup> The aim of Art 6 EGHGB is clear. However, authors are far from agreed about the actual results of the Article: see generally Hoffmann 219-42. There are two major theories. The first is that Art 6 EGHGB is simply a normal provision and contains no special conflict of laws rule. Therefore, the court must first apply German conflict of laws rules to determine if German law applies to the contract of carriage. If it does, Art 6 EGHGB applies and its provisions determine whether or not §662 HGB applies. The second is that Art 6 EGHGB itself contains an overriding conflict of laws rule. Therefore, whenever a German court is dealing with a carriage contract it must apply Art 6 EGHGB to determine whether §662 applies, regardless of the proper law of the contract. The second theory accords more closely with the text and purpose of Art 6

The situation is complicated by Germany's ambivalent attitude toward the Hague-Visby Rules. Germany has incorporated the Hague-Visby Rules into its HGB without ratifying the treaty. At the same time, it remains a party to the Hague Rules and is therefore under obligations at international law to the other Hague Rules nations.<sup>64</sup> Art 6 EGHGB is an attempt to cope with this ambivalence. Art 6 I EGHGB tries to give the German version of the HGB that mirrors the Hague-Visby Rules the widest possible application. That application is, however, restricted by Art 6 II EGHGB, which attempts to satisfy Germany's obligations under the Hague Rules<sup>65</sup> by providing that where the particular carriage of goods has anything to do with a Hague Rules nation (other than Germany), the German version of the HGB that mirrors the Hague Rules apply. The only difference between the two versions of the HGB is that references to the carrier's liability as 2 SDRs per kilogram in §612(2) and §660(1) do not apply under the Hague Rules version.

The result is as follows. On the one hand, Art 6 I EGHGB provides that §662 applies to the carriage of goods by sea under a bill of lading if:<sup>66</sup>

- the bill of lading was issued in a Hague-Visby nation (regardless of the origin or destination);
- the bill of lading was issued in Germany and the carriage is not to or from a Hague nation (other than Germany);
- the bill of lading was issued in a nation that is neither a Hague nation nor a Hague-Visby nation and the carriage is either to or from Germany, or to or from a Hague-Visby nation;

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EGHGB and is supported by the dominant academic opinion: see eg P & R 707; Hoffmann 238.

<sup>64</sup> R. Herber "Das zweite Seerechtsänderungsgesetz" (1986) *Transportrecht* 249, 254; R. Herber *Das neue Haftungsrecht der Schifffahrt* (1989) 219 and Mankowski "Neue internationalprivatrechtliche Probleme des Konnossements" (1988) *Transportrecht* 410, 416.

<sup>65</sup> In particular, the obligation not to impose a limit on the carrier's liability that is lower than that found in the Hague Rules.

<sup>66</sup> See generally Hoffmann 243-8.

- the carriage is to a Hague-Visby nation (regardless of the place where the bill of lading was issued); or
- the bill of lading refers to the Hague-Visby Rules or to the law of a nation that has incorporated the Hague-Visby Rules in its legislation, regardless of where the bill of lading was issued.

On the other hand, Art 6 II EGHGB provides that §662 HGB applies, with the limitation that the references to the carrier's liability as 2 SDRs per kilogram in §612(2) and §660(1) do not apply if the bill of lading was issued in a Hague nation (other than Germany) and the carriage is to a Hague nation (including Germany) regardless of the port of origin.<sup>67</sup>

Despite Art 6 II EGHGB, however, the German version of the Hague-Visby Rules applies where the bill of lading refers to the Hague-Visby Rules or to the law of a nation that has incorporated the Hague-Visby Rules in its legislation, regardless of where the bill of lading was issued.

The result for carriage between Australia and Germany is that the Hague-Visby Rules version of the HGB will almost invariably apply.<sup>68</sup>

## 2 Choice of Law

Art 27 EGBGB provides for freedom in the choice of the proper law of a contract, as long as the parties agree to that choice.<sup>69</sup> It should be

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<sup>67</sup> Therefore, in the case of carriage affecting a Hague nation (except where Germany is the only Hague nation affected), the limit of liability found in the German version of the Hague Rules applies (i.e., 666.67 SDR per unit), and not the limit of the proper law of the contract. That is the case even when that limit may be higher than the German limit. See P 188-90, who criticises this position.

<sup>68</sup> The only exception is where the bill of lading was issued in a Hague nation and there is no reference in the bill of lading to the law of a nation that has incorporated the Hague-Visby Rules in its legislation.

<sup>69</sup> That agreement must be either express or evidenced by conclusive actions of the parties. It is not enough that the contract uses foreign language or legal institutions. The effectiveness of a choice of law is determined by reference to the law that would be applicable if the choice of law were effective. A choice of jurisdiction clause raises the presumption that the law of that jurisdiction has been chosen as the proper law (but not vice versa): see P & R 323. The parties can agree to choose the proper law, or change the

remembered, however, that Art 6 EGHGB applies regardless of the proper law of the contract. Art 6 EGHGB therefore has the same effect as invalidating every choice of law clause in so far as that choice ousts the compulsory application of §662 HGB. Art 27 EGBGB makes it possible to have two different laws govern the contract of carriage – §662 HGB (and the provisions it prescribes as compulsory) where it applies due to Art 6 EGHGB, and a law as chosen by the parties according to Art 27 EGBGB for the rest.<sup>70</sup>

### 3 Choice of Jurisdiction

At German law jurisdiction clauses are generally upheld by the courts.<sup>71</sup> According to §§138 and 242 BGB, and judicial interpretation of Art 3 r 8 of the Hague Rules,<sup>72</sup> they are not upheld where they select a jurisdiction the substantive law of which will impose a limit on the carrier's liability that is lower than the German limit. However, they remain valid where the chosen jurisdiction will impose the Hague Rules even if its imposition of those Rules will lead to a lower limit of liability than under the HGB (for example, because of the way the limit is

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already chosen proper law, even after the contract is completed. This often happens by implication when the parties begin proceedings in a jurisdiction and there is no choice of law in the contract. The law of the forum is deemed to have been chosen by the parties' decision to proceed in that jurisdiction. The rights of third parties are not affected by this post-contractual choice: see P & R 312-3.

<sup>70</sup> In the absence of an express agreement, Art 28 EGBGB provides that the proper law for the rest of the contract will usually be the law of the port of discharge: see P & R 315-6. Prior to the EGBGB's amendment in 1986, the presumed proper law of the contract was the law of the jurisdiction of the destination of the cargo. This was regarded as more sensible than the new presumption which has attracted criticism in relation to maritime law: see P & R 309-10. Further, Art 28 EGBGB makes it possible, in the case where there is no express choice of law, for different parts of the contract to be governed by the laws of different jurisdictions (ie the laws with the closest connection to each part).

<sup>71</sup> §§38-40 *Zivilprozessordnung* (ZPO – Rules of Civil Procedure). One basic condition is that the chosen jurisdiction must be willing to accept jurisdiction, otherwise the German court will assume jurisdiction: see P & R 326. Whether jurisdiction clauses are valid in terms of content and form is assessed by the proper law of the contract determined by German conflict of laws rules.

<sup>72</sup> There is no equivalent provision in German law.

converted into national currency).<sup>73</sup> Arbitration clauses are generally upheld.<sup>74</sup>

#### 4 Proof of Foreign Law

The parties are not required to plead the application of a foreign law. If the court sees that such a law is to be applied, it does so on its own account. Likewise, the parties do not prove the foreign law. The court discovers what the foreign law is itself, by appointing experts to give evidence on that law.<sup>75</sup>

### IV COMPARISON OF THE LIMITED LIABILITY REGIMES

#### A Content of the *Bill of Lading*

##### 1 Particulars as to Marks, Number, Quantity and Weight

Art 3 r 5 provides that the shipper is liable for any damage and expense caused by inaccuracies in the bill of lading as to the “marks, number, quantity and weight” (but importantly not as to the condition) of the goods shipped. §563(1) makes a *Befrachter/Ablader* responsible to the carrier for particulars of “quantity, number or weight as well as marks”. The *Befrachter/Ablader* is liable to the carrier for damage caused by its own inaccuracies concerning those particulars irrespective of fault.<sup>76</sup> The HGB’s strict liability regime is therefore more stringent than the Hague-Visby Rules with its fault-based liability.<sup>77</sup>

§563(2) provides that §563(1) does not affect the relationship (arising out of the contract of carriage) between the carrier and persons

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<sup>73</sup> This is because of Germany’s obligations as a party to the Hague Rules: see P & R 325-6; P 198.

<sup>74</sup> See generally P & R 329-33.

<sup>75</sup> §293 ZPO.

<sup>76</sup> On apportionment of liability between the *Befrachter* and *Ablader*, see P & R 388; §254 BGB.

<sup>77</sup> See P & R 387.

other than the *Befrachter/Ablader*.<sup>78</sup> The receiver's relationship with the carrier is therefore not affected.<sup>79</sup> Art 3 r 5 has the same effect.

## 2 Particulars as to Order and Condition

§564(1) makes a *Befrachter* and *Ablader* liable to each other, the carrier, shipowner, receiver, travellers and crew for any damage caused by inaccuracies as to the type and condition of the goods brought on board.<sup>80</sup> That liability is fault-based. §564 does not apply compulsorily to a bill of lading and may be contracted out of. There is no equivalent provision in Australian law.<sup>81</sup>

“Damage” includes pure economic loss and consequential damage.<sup>82</sup> The *Befrachter* is liable for any damage caused to its own or any other goods.<sup>83</sup> The description of type and condition should be in the usual terminology of the place of loading.<sup>84</sup> If the inaccuracy was provided knowingly, the carrier is freed of all liability, including liability to the receiver.<sup>85</sup> If the damage is caused jointly by the inaccuracy and the carrier (even in the case of unseaworthiness), §254 BGB apportions liability.<sup>86</sup> Liability to persons other than the master is not excluded by the fact that the master agreed to such shipment.<sup>87</sup> The *Befrachter* (or *Ablader*) cannot avoid payment of freight if its property is confiscated because of an inaccuracy.<sup>88</sup>

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<sup>78</sup> §563(2) applies mandatorily to bills of lading. §563(1) does not and can therefore be contracted out of.

<sup>79</sup> If the receiver is not the *Befrachter* or *Ablader* or their agent: see P & R 389.

<sup>80</sup> The same holds where the *Befrachter/Ablader* ships contraband or other illegal goods: §564(2). See P & R 390-1.

<sup>81</sup> D & D 256.

<sup>82</sup> P & R 391.

<sup>83</sup> P 42-3.

<sup>84</sup> HOLG HGZ 80, 339 and see P & R 390. If inaccurately described cargo poses a threat to the ship or other cargo, the master can land the cargo or, in an emergency, throw it overboard, without attracting liability – §564(5).

<sup>85</sup> P & R 391.

<sup>86</sup> *Ibid.*

<sup>87</sup> §564(3). §564c provides that in the case of §564, the master is deemed to have the same knowledge as the shipowner or ship's agent.

<sup>88</sup> §564(4).

### 3 Said to Contain

The position in both jurisdictions in respect of the words “said to contain” or “STC” or “shipper’s load stow and count” in the bill of lading is essentially the same. Such words cancel any representation by the carrier as to the condition of the goods themselves (as opposed to the container in which they were packed),<sup>89</sup> or the weight and quantity of the goods.<sup>90</sup> That is the case in Germany only where the carrier can show, either that it had reasonable grounds for suspecting that the information given to it was incorrect, or that it had no reasonable means of checking the validity of the information.<sup>91</sup> The plaintiff must establish that the goods were, in fact, in good order and condition, or of the stated weight or quantity, when shipped. The negotiability of the bill of lading is not affected by the insertion of words such as “said to contain”.<sup>92</sup> If the notation does not appear on the plaintiff’s copy of the bill of lading, it is of no consequence that it appears on other copies: the carrier cannot rely on the other copies.<sup>93</sup>

### 4 “Dirty” Clean Bill

Neither the Hague-Visby Rules nor the HGB contain specific provisions regarding the legality of the practice of issuing clean bills for defective goods against a letter of indemnity from the shipper.<sup>94</sup> Under general law, if there is a genuine dispute between the shipper and the carrier as to the condition of the goods, the carrier may issue a clean bill with the protection of an indemnity and that indemnity will be

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<sup>89</sup> *Marbig Rexel Pty Ltd v ABC Container Line NV (The TNT Express)* [1992] 2 Lloyd’s Rep 636 (NSW SC).

<sup>90</sup> Australia: *Rosenfeld Hillas & Co Pty Ltd v The Ship Fort Laramie* (1923) 32 CLR 25, 34, 38; *Ace Imports ppl v Companhia De Navegacao Lloyd Brasileiro* (1987) 10 NSWLR 32. Germany: §646 – in effect reversing the burden of proof provided for in §656(2).

<sup>91</sup> §§645, 656(3)2. The “STC” clause is effective in relation to containerised cargo: P 76.

<sup>92</sup> *Golodetz & Co Inc v Czarnikow-Rionda Co (The Galatia)* [1980] 1 Lloyd’s Rep 453.

<sup>93</sup> P & R 639.

<sup>94</sup> When a clean bill has been issued, the carrier is estopped from denying to the consignee or endorsee that the goods were in good order and condition: see Art 3 r 4; D & D 256.

enforceable.<sup>95</sup> In that case, the limited liability regimes of the Hague-Visby Rules and the HGB will apply.

However, such an indemnity given by the shipper to the carrier is illegal and ineffective when the carrier has made a deliberate misrepresentation about the condition of the goods.<sup>96</sup> Under Australian law, the carrier will be liable according to the Hague-Visby Rules. The position is different under German law: the HGB limitations and exclusions of liability will not apply.<sup>97</sup> The carrier is therefore liable to the receiver in full for any discrepancy between the actual condition of the goods and the condition stated in the bill of lading.<sup>98</sup>

## **B Carrier's Liability**

### **1 Initial Seaworthiness**

Art 3 r 1(a) provides that the carrier must exercise due diligence before and at the beginning of the voyage to make the ship seaworthy. §559 provides that a carrier must provide a ship that is both seaworthy (*seetüchtig*) and cargoworthy (*ladungstüchtig*), and is liable “for the damage” caused by a lack of seaworthiness. That degree of liability is broader than the liability under the Hague-Visby Rules, which is only for “loss or damage to or in connection with the goods”.<sup>99</sup> It is also broader than the liability under §606 (carefully load, handle etc the goods), which is only for “loss or damage of the goods”. The carrier is not liable where

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<sup>95</sup> *Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 QB 621, 639; and see *Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd* (1993) 117 ALR 507. Germany: HOLG Hamburg MDR 70, 146, HOLG Hamburg Hansa 85, 798 and 800 (“Kapetan Martinovic”); P & R 674.

<sup>96</sup> *Ibid*; §138 BGB.

<sup>97</sup> However, §612 HGB (the time bar) continues to apply due to its broad wording.

<sup>98</sup> P 76, 142, 178-9.

<sup>99</sup> Under German law, therefore, if unseaworthiness causes a delay to the ship, the carrier is liable for a loss in market value of the cargo: P & R 358-9. This liability for economic loss is not covered by the limitation of liability in §662, which limits the carrier’s liability only for “loss or damage of the goods”.

the defect could not be detected by the “due diligence of an ordinary<sup>100</sup> carrier before the commencement of the voyage”.<sup>101</sup>

“Seaworthy” is given its ordinary meaning: “the vessel – with her master and crew – is herself fit to encounter the perils of the voyage and also fit to carry the cargo safely on that voyage.”<sup>102</sup> The standard applied to determine the seaworthiness of a ship varies according to the destination and the cargo to be carried.<sup>103</sup> If the cargo needs special conditions (for example, cool rooms), these must be provided.<sup>104</sup>

“Due diligence” has been defined in terms of the standard of reasonable care in the tort of negligence.<sup>105</sup> This requires the carrier to exercise “reasonable skill, care and competence in light of the circumstances reasonably apparent at the time.”<sup>106</sup>

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<sup>100</sup> The German word used is “*ordentlich*” which is variously translated as “ordinary”, “diligent”, “orderly”, and “prudent”.

<sup>101</sup> §559(1) provides that “as regards any type of contract of affreightment the carrier shall ensure that the ship is in a seaworthy condition, properly equipped, outfitted, manned, and sufficiently supplied (seaworthiness), as well as that the storage holds including the cold storage and freezer rooms are in the required condition for the loading, transportation and preservation of goods (cargoworthiness).” §559(2) provides that the carrier “is liable to the cargo owners for any damage caused by a defect in seaworthiness or in cargoworthiness, except when such defect could not be detected by the exercise of the care of an ordinary carrier until the commencement of the voyage.” The carrier is, however, liable where a defect in the seaworthiness or cargoworthiness not detectable within that time frame, but which originated in a detectable defect, causes damage: HOLG Bremen VersR 78, 509, HOLG Hamburg MDR 74, 674, HOLG Hamburg VersR 78, 958, HOLG Hamburg VersR 72, 636 (“Ismente”); P & R 360, 512.

<sup>102</sup> *Actis Steamship Co Ltd v The Sanko Steamship Co Ltd (The Aquacharm)* [1982] 1 Lloyd’s Rep 7, 9. The German version is that the ship must be “generally appropriate for the [acceptance, carriage, stowage and discharge] of the goods”: HOLG Hamburg MDR 71, 668 (“Remscheid”); P & R 362.

<sup>103</sup> Australia: see *The Waltraud* [1991] 1 Lloyd’s Rep 389; *Empresa Cubana Importada de Alimentos “Alimport” v Iasmos Shipping Co SA (The Good Friend)* [1984] 2 Lloyd’s Rep 586; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1991] 1 Lloyd’s Rep 456; D & D 269. Germany: HOLG HGZ 05, 295; HOLG HGZ 06, 226; HOLG VersR 72, 1064; BGH VersR 74, 483; P & R 359-60.

<sup>104</sup> HOLG HGZ 14, 1; HOLG HGZ 14, 237; HOLG Bremen Hansa 58, 2443; P & R 362.

<sup>105</sup> *Union of India v NV Reederij Amsterdam* [1963] 2 Lloyd’s Rep 223, 235.

<sup>106</sup> Australia: D & D 270, citing *Union of India v NV Reederij Amsterdam* [1963] 2 Lloyd’s Rep 223; *The Australian Star* (1940) 67 Ll L Rep 110; *Kuo International Oil Ltd v Daisy Shipping Co Ltd (The Yamatogawa)* [1990] 2 Lloyd’s Rep 39, 50. Under German law the position is the same: “due diligence” is defined in similar terms to §606, which provides that the test is

“Before and at the beginning of the voyage” means from at least the moment of loading of the goods<sup>107</sup> until the ship begins its voyage to the port of discharge.<sup>108</sup> If the ship calls at ports en route, the carrier is under no obligation to owners of cargo loaded at a previous port to repeat the exercise of due diligence.<sup>109</sup>

The Hague-Visby Rules and HGB limited liability regimes apply despite a breach of the duty to exercise due diligence to provide a seaworthy ship.<sup>110</sup> However, under Australian law, the carrier is not protected by the exemptions from liability in Art 4 r 2<sup>111</sup> and Art 4 r 6<sup>112</sup> (dangerous cargo) of the Hague-Visby Rules, and under German law, it is not protected by the exemptions of §606,<sup>113</sup> §607(2)<sup>114</sup> and §608(1)<sup>115</sup> of the HGB (equivalents of Art 4 r 2).<sup>116</sup> Unlike under Australian law, it is protected by §564b(1) (dangerous cargo).

## 2 The Carrier and the Goods

Art 3 r 2 provides that “the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.” “Properly” is defined as more than “carefully”. It means “in accordance

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an objective one in terms of an ordinary carrier: §276 BGB provides a definition of due diligence in these terms: see P & R 494.

<sup>107</sup> *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589, 603 (PC).

<sup>108</sup> Australia: *The Makedonia* [1962] P 190. Germany: “before the commencement of the voyage” means from the “beginning of loading until the start of the voyage”. The start of the voyage is when the ship makes its first movement away from the quay: Hansa 60, 1317. The carrier is liable for damage caused outside this period according to §§606-608. See generally P & R 364.

<sup>109</sup> Australia: *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd (The Chyebassa)* [1967] 2 QB 250, [1966] 1 Lloyd’s Rep 450. Germany: P 100, 111-2.

<sup>110</sup> At Australian law, the carrier’s liability is limited for even economic loss while under German law it is limited only for loss or damage of the goods themselves.

<sup>111</sup> See D & D 272; D Butler & W Duncan, *Maritime Law in Australia* (1992) 84 (hereinafter B & D).

<sup>112</sup> *The Fiona* [1994] 2 Lloyd’s Rep 506.

<sup>113</sup> Equivalent of Art 4 r 2(p), (q).

<sup>114</sup> Equivalent of Art 4 r 2(a), (b).

<sup>115</sup> Equivalent of Art 4 r 2(c), (e)-(o).

<sup>116</sup> P & R 366. P 142-3 agrees.

with a sound system”.<sup>117</sup> By contrast, §606 provides that “the carrier is obliged to proceed with the care of an *ordentlichen* carrier during the loading, stowing, forwarding, handling and unloading of the goods”. There is no equivalent reference to handling the goods “properly”.

Art 2 makes the carrier liable for “loss or damage to or in connection with the goods” caused by a breach of Art 3 r 2. §606 makes the carrier expressly liable for “loss or damage of the goods” in the period from acceptance until delivery.<sup>118</sup> The liability of the carrier under the HGB is therefore narrower than under the Hague-Visby Rules. Damage other than loss or damage of the goods (for example, pure economic loss) does not come under §606 and is regulated by general law.

“With the care of an *ordentlichen* carrier” is an objective test relative to the knowledge, ability and insight of the normal carrier as currently practised by such a carrier, but subject to the conditions of the actual performance of the duties (for example, the type of cargo, ship and port etc).<sup>119</sup>

Under English law, a carrier can validly contract out to the shipper/receiver both the performance and the responsibility of parts of the carrier's responsibilities under Art 3, r 2 (for example, loading, stowing, trimming and discharging).<sup>120</sup> The carrier must do “properly and carefully” only those things that it agrees to perform.<sup>121</sup> In contrast, under US law, the carrier can only contract out of performance, but not responsibility.<sup>122</sup> Considering Australia's status as an importing/exporting nation rather than a fleet-owning nation, policy

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<sup>117</sup> See *The Iron Gipsland* (1993) 34 NSWLR 29, 61-2 (NSW SC) per Carruthers J, citing with approval *Albacora SRL v Westcott & Laurence Line Ltd* [1966] 2 Lloyd's Rep 53 (HL). The question of what is meant by “properly” was left open by the High Court in *Shipping Corp of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142.

<sup>118</sup> The carrier can, and usually does, contract out of responsibility for the period after discharge.

<sup>119</sup> See §276 BGB and cases cited in P & R 494. The test is therefore the same as the test for “the care of an ordinary carrier” under Australian law.

<sup>120</sup> *The Coral* [1993] 1 Lloyd's Rep 1.

<sup>121</sup> *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, 417-8.

<sup>122</sup> *Associated Metals & Minerals Corp v M/V Arktis Sky* 978 F 2d 47 (2nd Cir 1992).

reasons support Australian law following the US position.<sup>123</sup> Considering the wording of the German law (“proceed with the care of an ordinary carrier *during* the loading” etc) there is no requirement for the carrier to undertake any of these tasks, but as soon as it does so, it is under an obligation to do them carefully.<sup>124</sup> The German position is therefore the same as in English law, and different from that in the US and possibly Australia.

A breach of Art 3 r 2 or §606 renders the carrier liable under the limited liability regimes.<sup>125</sup> Under Australian law, such a breach deprives the carrier of the exemptions from liability in Art 4 r 1, r 2(c)-(q) and r 3.<sup>126</sup> German law is more strict: the carrier is deprived of its exemptions under §607(2) – equivalent to Art 4 r 2(a) and (b) – in addition to those under §608(1)<sup>127</sup> and §606.<sup>128</sup>

### 3 Deck Carriage

Art 1(c) provides that the Hague-Visby Rules do not apply to cargo that is stated in the bill of lading as being carried on deck and is so carried. §663(2)1 provides that §662 (the compulsory application of certain

<sup>123</sup> See eg Stephen J in dissent in the High Court in *The New York Star* (1978) 139 CLR 231, 258-9, who exposes an important distinction between the interests of “great fleet-owning nations” and importing/exporting nations: “While it is the interests of the [former] that their ocean carriers, and the servants and independent contractors which they employ, should be as fully protected as possible from liability at the suit of shippers and consignees, the interests of those nations which rely upon those fleets for their import and export trade is to the contrary . . . . It is not clear to me that Australian courts should regard it in any way in the public interest that carriers’ exemption clauses, effective before loading and after discharge, should be accorded any benevolent interpretation, either so as to benefit carriers or so as to benefit independent contractors by extending the scope of such clauses to include such contractors.”

<sup>124</sup> P & R 495-8, but *cf* P 104, who believes that the position in Germany is undecided. It is true that where there is no contractual agreement, §§561 (loading) and 593 (discharge) assign the responsibilities of loading and discharge. However, these provisions do not apply compulsorily and can be contracted out of.

<sup>125</sup> See P & R 504.

<sup>126</sup> Art 4 r 2(a), (b) and rr 4-6 still apply – *Shipping Corp of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142, 154, 165.

<sup>127</sup> Equivalent to Art 4 r 2(c), (e)-(o).

<sup>128</sup> Equivalent to Art 4 r 2(p), (q). However, the carrier loses none of the other protections of the HGB: P & R 507.

paragraphs) does not apply when the bill of lading states that the cargo is to be carried on deck and is so carried. In such a case, the bill of lading and general law govern the rights and obligations of each party.<sup>129</sup>

A carrier breaches its contract if it carries cargo on deck without the shipper's authorisation.<sup>130</sup> There is an important difference between the two countries' law in the required quality of authorisation. Under Australian law, it must be express.<sup>131</sup> Under German law, it may be implied by all the circumstances. Therefore, the shipper of cargo which is typically, or can only be, carried on deck is held to have consented to that deck carriage and the application of the HGB.<sup>132</sup> Considering the frequency with which containers are nowadays shipped on deck, they belong to the class of cargo that is typically shipped on deck.<sup>133</sup>

Under Australian law, unauthorised deck carriage is governed by the Hague-Visby Rules. Therefore, even where the carrier has breached its contract, the limitation amounts and time bar apply. The exemptions continue to apply with their own rules of application<sup>134</sup> – if the breach was in any way the cause of the loss or damage, the exemptions do not apply. According to Prüßmann and Rabe, the position under the HGB is exactly the same.<sup>135</sup> Puttfarcken disagrees, arguing that unauthorised

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<sup>129</sup> As long as the bill of lading also stipulates that the otherwise compulsory provisions of the HGB do not apply: P & R 404.

<sup>130</sup> §566 provides that the carrier may not carry goods on deck nor suspend them from the ship's sides without the consent of the *Ablader*. Where another law (whether German or foreign, as the case may be) provides that certain cargo must be carried on deck, §566 does not apply: see Sieg MDR 56, 711; P & R 403.

<sup>131</sup> *Burton v English* (1883) 12 QBD 218; *Wright v Marwood* (1881) 7 QBD 62, *Johnson v Chapman* (1865) CB (NS) 563.

<sup>132</sup> HOLG HGZ 94, 33 and see P & R 403. The position is the same under US law, where the shipper of cargo that is typically carried on deck is taken to have consented to that deck carriage and the application of the Hague-Visby Rules: *English Electric Valve Co Ltd v M/V Hoegh Mallard* 814 F 2d 84 (2nd Cir, 1987).

<sup>133</sup> See P & R 405-6. S 7 COGSA provides that regulations may be made to provide for increased coverage of deck cargo by COGSA. The Australian position will approach the German position if such regulations are made.

<sup>134</sup> See generally *The Antares (Nos 1 & 2)* [1987] 1 Lloyd's Rep 424; D & D 274-7.

<sup>135</sup> P & R 407: unauthorised deck carriage breaches §606 (duty to carefully load, handle etc). The carrier is therefore liable according to §§658-660 (limited liability) and the §612 time bar applies. However, the exemptions from liability do not apply provided the

deck carriage falls outside §606 – it is a breach of the contract of carriage, leading to unlimited liability<sup>136</sup> and only §612 (the time bar) continues to apply.<sup>137</sup>

#### 4 Carrier's Obligation to Deliver

The carrier must deliver the goods to the holder of the bill of lading and may assume that that person has good title.<sup>138</sup> If the carrier delivers the goods to any person who does not hold the bill of lading, it does so at the risk of being sued by the true owner of the goods. That misdelivery is a breach of the contract of carriage.<sup>139</sup> Despite that breach, the Hague-Visby Rules and HGB continue to apply, thus limiting the carrier's liability.<sup>140</sup> Under Australian law, it is possible for the carrier, by way of a clause in the bill of lading, to exclude all liability after discharge even for misdelivery.<sup>141</sup> An exclusion from liability for misdelivery is not possible under German law.<sup>142</sup>

#### 5 Liability for Others

##### (a) Seaworthiness

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unauthorised deck carriage was the “deciding cause” of the loss or damage and the loss or damage would not have occurred if the goods had been stowed under deck.

<sup>136</sup> See P 142, 168-9.

<sup>137</sup> This is because the wording of §612 frees the carrier “from every liability for the goods”, and not just from liability arising out of “loss or damage to the goods”.

<sup>138</sup> HOLG Hamburg TranspR 87, 69 (“Dithmarschen”). Therefore, the carrier must deliver to a thief who has stolen a bill of lading to order with blank endorsement (according to §648), provided the carrier does not know or ought not know that the holder has obtained the bill of lading illegitimately: see P & R 646.

<sup>139</sup> Australia: see D & D 327. Germany: the *Konnossement* alone transfers rights to the goods and the goods may not be delivered except against a copy of the *Konnossement* – §§648 and 653 HGB: see P 68-9.

<sup>140</sup> Australia: see D & D 327. Germany: see P 68-9.

<sup>141</sup> *The Antwerpen* [1994] 1 Lloyd's Rep 213 (NSW CA).

<sup>142</sup> §§9 and 24 AGBG (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* – Trade Practices Act).

Under Australian law, the carrier is liable for a failure by an employee, agent or independent contractor to exercise due diligence to ensure a seaworthy ship,<sup>143</sup> but is not liable for someone else's lack of due diligence that occurred before the ship came into its hands.<sup>144</sup> Under German law, the carrier is liable for a lack of due diligence by its *Erfüllungsgehilfen* (anyone who acts for the purposes of carrying out the carrier's obligations) according to §278 BGB.<sup>145</sup> Where the carrier is liable for others under §278 BGB, any exemptions and limitations applicable to the carrier's liability for its own acts (for example, the §660 limitation amount) apply to the carrier's liability for the acts of others.<sup>146</sup>

### (b) Load, handle etc the goods

As explained above, under Australian law the carrier can never contract out of responsibility for the loading, handling etc of the goods. It is liable for a breach of its duty to do properly and carefully those tasks, regardless of who has undertaken them.<sup>147</sup> Under German law, §607(1) provides that the carrier is liable for its own acts and those of its servants and ship's company according to the provisions of the HGB.<sup>148</sup> Where the carrier has contracted out of<sup>149</sup> the performance of

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<sup>143</sup> *W Angliss & Co (Aust) Pty Ltd v Peninsular and Oriental Steam Navigation Co* [1927] 2 KB 456; *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807; *The Yamatogawa* [1990] 2 Lloyd's Rep 39.

<sup>144</sup> *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807, 841-2 per Viscount Simonds.

<sup>145</sup> This liability is different from that under the HGB, but results in the same practical outcome: see P & R 366, 510. However, the carrier is not liable for a lack of due diligence by its servants (for a detailed definition of "servant", see P & R 509-10 – suffice it here to note that independent contractors are not servants of the carrier) or ship's company ("ship's company" is included to avoid confusion in certain circumstances: see P & R 510), provided they are not acting as *Erfüllungsgehilfen*. §607(1) applies only to liability under §606 and not under §559: see P & R 366.

<sup>146</sup> P & R 510.

<sup>147</sup> See *Butler and Duncan*, 85.

<sup>148</sup> §607(1). §278 BGB makes the carrier also liable according to the BGB liability regime for its *Erfüllungsgehilfen* (anyone who acts for the purposes of carrying out the carrier's obligations), provided they are not its servants or ship's company. This liability is different from the HGB's liability, but comes to the same practical conclusion – see the

(and therefore the responsibility for) certain parts of the loading, handling etc, the person who carries out those parts is liable alone for any damage it causes to the goods. The plaintiff must sue that person directly (either in contract or tort) – the carrier is not liable at all. Where the carrier is liable for others under §607(1) HGB, the exemptions and limitations applicable to the carrier’s liability for its own acts (for example, the §660 limitation amount) apply to the carrier’s liability for the acts of others.<sup>150</sup>

## ***C Limitation of Carrier’s Liability***

### **1 Said to Contain**

The effect on the carrier’s liability of inserting “STC” before the number of packages or units enumerated on the bill of lading is not clear under Australian law. Davies and Dickey agree with the “consensus of academic opinion” that it has no effect.<sup>151</sup> The position is different under German law: the rebuttable presumption is that the number of packages stated in the bill of lading was, in fact, shipped.<sup>152</sup> The insertion of “STC” negates this presumption.<sup>153</sup> The burden of proof then shifts to the plaintiff to prove the number of packages that was shipped. If it cannot prove the number of packages shipped in the container, the whole container is treated as one package, and the carrier’s liability is limited accordingly.

### **2 Extent of Carrier’s Liability**

The HGB and Hague-Visby Rules vary considerably on the extent of loss or damage for which the carrier is liable.

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text accompanying fn. 203 and P & R 510. §278 BGB applies only where §607(1) HGB does not expressly regulate the situation – see P & R 508-9.

<sup>149</sup> In a contract between carrier and *Befrachter*.

<sup>150</sup> P & R 510.

<sup>151</sup> D & D 298.

<sup>152</sup> §656.

<sup>153</sup> See P & R 702.

Under the HGB, the carrier is liable “for the damage” caused by unseaworthiness before and at the start of the voyage – §559. On the other hand, it is liable only for “loss or damage of the goods” caused by negligence in the loading, handling etc of the goods – §606. Therefore, the carrier is liable for pure economic loss if it is caused by unseaworthiness, but not if it is caused by negligence in cargo handling.<sup>154</sup> The carrier’s liability is limited only in terms of “loss or damage of the goods” – §660. Therefore, any liability for pure economic loss cannot be limited in terms of §660. The exemptions from liability in §608(1) apply only to “loss or damage of the goods”.<sup>155</sup> The time bar to actions – §612 – applies to any liability, including liability for economic loss.

There are some important differences between the German and Australian positions. Under Australian law, the carrier is liable for “loss or damage to or in connection with the goods” whether unseaworthiness or negligence in cargo handling was the cause.<sup>156</sup> This includes not only physical loss or damage of the goods, but also economic loss (because of, for instance, delay or misdelivery).<sup>157</sup> This liability is narrower than the German liability in the case of unseaworthiness (loss or damage to the *goods* compared with the German “for the damage”) but broader in the case of negligence (the Australian law has the extra clause: “or in connection with”). At Australian law, the carrier’s liability is limited for “loss or damage to or in connection with the goods”. This extends to economic loss and is therefore broader than the German limitation. The Australian time bar, like the German one, extends to economic loss.

## ***D Carrier’s Exemptions from Liability***

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<sup>154</sup> P & R 508. P 170-3, disagrees, arguing that “loss or damage” extends to pure economic loss, provided the cause of the damage falls within the HGB regime.

<sup>155</sup> P & R 525.

<sup>156</sup> See Art 4 r 5(a), (h).

<sup>157</sup> *Anglo-Saxon Petroleum Co v Adamastos Shipping Co* [1957] 2 QB 233, 253 (affirmed [1957] AC 149, 157, 186) and *SS Ardennes (Cargo Owners) v SS Ardennes (Owners)* [1951] 1 KB 55.

Art 4 r 2(a)-(q) of the Australian law lists 17 exemptions to the carrier's and ship's liability for "loss or damage". The German regime is different.<sup>158</sup> §608(1) HGB, which speaks of "presumed non-liability of the carrier" rather than "exemptions", and provides a more narrow exemption for "loss or damage of the goods"<sup>159</sup>, contains nine of the Art 4 r 2 exemptions: §608(1)1 ((c) perils of the sea); §608(1)2 ((e) act of war, (f) act of public enemies, part of (g) arrest or restraint of princes, rulers or people, (h) quarantine restrictions and (k) riots and civil commotion); §608(1)3 (the rest of (g) seizure under legal process); §608(1)4 ((j) strikes etc); §608(1)5 ((i) act or omission of the shipper or owner of the goods, agent or representative, (n) insufficiency of packing, and (o) insufficiency or inadequacy of marks); §608(1)6 ((l) saving or attempting to save life or property); and §608(1)7 ((m) inherent defect, quality or vice); while the rest are either tucked away elsewhere or left out: §606 ((p) latent defects, and (q) catch all); §607(2) ((a) in the management and navigation, and (b) fire); and (d) act of God is left out.

Under both Australian and German law, the carrier may contract out of these exemptions,<sup>160</sup> but any clause that tries to extend the circumstances in which the carrier's liability will be excluded is null and void.<sup>161</sup>

## 1 Perils, Dangers and Accidents of the Sea

The perils of the sea exemption is probably one of the most important in practice. It is also the place where Australian and German substantive law most significantly deviates.

"Perils, dangers and accidents of the sea" has a wide definition in Australia.<sup>162</sup> This is in contrast to the position under German law.

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<sup>158</sup> See P & R 525, for an explanation of this difference; P 106-8, for a critique of the manner in which the exemptions appear in the HGB.

<sup>159</sup> P & R 525.

<sup>160</sup> Art 4 r 5(g), Art 5 and §662(3).

<sup>161</sup> Australia: Art 3 r 8 and Art 4 r 5(g). Germany: §§138 and 242 BGB, and judicial interpretation of Art 3 r 8 of the Hague Rules (there is no express provision in the HGB).

<sup>162</sup> See generally D & D 289-91.

Under Australian law, the carrier must show that the cause of loss or damage to the goods was a “fortuitous accident or casualty of the seas”.<sup>163</sup> There is no requirement of unforeseeability: “sea and weather conditions which may reasonably be foreseen and guarded against may constitute a peril of the sea.”<sup>164</sup> The landmark Australian case is *The Bunga Seroja*.<sup>165</sup> In that case, the captain “*anticipated* bad weather during the voyage”.<sup>166</sup> The ship encountered winds of force 11 (one degree less than a hurricane) and cargo was lost and damaged. Despite this, the court held that the damage had been caused by a peril of the sea, and the carrier was not liable. According to Carruthers J, “there must, of course, be some element of the fortuitous or unexpected to be found somewhere in the facts and circumstances causing the loss. *However, it is not the weather by itself which is fortuitous, it is the particular damage occasioned to the cargo due to the weather, which is something beyond the ordinary wear and tear of the voyage.*”<sup>167</sup> He goes on to declare that “it is clear, on the highest authority, that under Australian law the mere fact that damage to cargo was occasioned by a storm which was ‘expectable’ does not, of itself, exclude a finding that the damage was occasioned by perils of the sea.”<sup>168</sup> He agrees<sup>169</sup> with Lord Herschell in *The Xantho*<sup>170</sup> that, provided the cause of the damage was “an accident which might happen, not an event which must happen”, it is a peril of the sea.

In stark contrast to the Australian position, “dangers and accidents of the sea or other navigable waters”<sup>171</sup> has a narrow meaning under German law.<sup>172</sup> The position is similar to that under US and Canadian

<sup>163</sup> *Skandia Insurance Co Ltd v Skoljarev* (1979) 142 CLR 375, 387.

<sup>164</sup> *Shipping Corp of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142, 166. See also *The Bunga Seroja* [1994] Lloyd’s Rep 455, 470.

<sup>165</sup> *The Bunga Seroja* [1994] Lloyd’s Rep 455 (SC NSW).

<sup>166</sup> *Ibid* 457 (emphasis added).

<sup>167</sup> *Ibid* 462 (emphasis added).

<sup>168</sup> *Ibid* 470. See also *N E Neter & Co Ltd v Licenses & General Insurance Co Ltd* [1944] 1 All E R 341, 343 where Tucker J states that “it is clearly erroneous to say that, because the weather was such as might reasonably be anticipated, there can be no peril of the seas.”

<sup>169</sup> *The Bunga Seroja* [1994] Lloyd’s Rep 455, 470.

<sup>170</sup> (1887) 12 AC 503.

<sup>171</sup> The wording is from §608(1) HGB.

<sup>172</sup> P 112-3, but *cf* P & R 525 who believe that it is impossible to give an accurate definition without the benefit of hindsight.

law.<sup>173</sup> They are only those dangers and accidents that a seaworthy ship with capable captain and crew could not ordinarily withstand.<sup>174</sup> Not only that, they must be unavoidable. Only damage actually caused by the danger of the sea is exempted.<sup>175</sup>

If a master knows, or ought to know, that there is a force 11 storm ahead and it can be avoided, the storm is not a “danger of the sea”. If difficult conditions at sea are seasonal or peculiar to a location, they are not “dangers of the sea” – they can be avoided.<sup>176</sup>

Puttfarken narrows the field even further: they must be unforeseeable on the basis of statistical data.<sup>177</sup>

## 2 Causal Link of Loss to an Exempted Peril

The required degree of causation is another area where the two countries’ laws differ significantly. The difference is in the burden of proof. Under Australian law, the carrier must prove conclusively that the loss or damage was caused solely by one or more of the exempted perils.<sup>178</sup> If the loss or damage was caused jointly by an exempted peril and a breach of Art 3 r 1 (seaworthiness) or Art 3 r 2 (properly and carefully load, handle etc) by the carrier, the carrier is denied the protection of Art 4 r 2. This is the case even where the loss or damage would have occurred without the carrier’s breach.<sup>179</sup> The causal link between exempted peril and loss or damage need not be direct.<sup>180</sup>

<sup>173</sup> See eg *The Tuxpan* (1991) AMC 2432, 2438: “the test for determining whether a storm constitutes a peril of the sea is whether – in light of all the circumstances – the storm was expectable”; *Charles Goodfellow Lumber Sales Ltd v Verreault & Anor* [1971] 1 Lloyd’s Rep 185.

<sup>174</sup> P 113. P & R 526-7 agree but argue further that the effect is that §608(1)1 is nothing more than a negative formulation of the liabilities of the carrier found in §559 and §606. The importance of §608 is therefore in its effect on the burden and order of proof.

<sup>175</sup> BGHZ 6, 127. See also P & R 527.

<sup>176</sup> P 113.

<sup>177</sup> P 113-4. As to the requirement of unforeseeability, see P & R 525-6, who come to the conclusion that German law is undecided on this point.

<sup>178</sup> *Commonwealth v Burns Philp & Co* (1946) 46 SR (NSW) 307, 312-3; *Shipping Corp of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142, 164.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Frank Hammond Pty Ltd v Huddart Parker Ltd* [1956] VLR 496, 498.

Under German law, the carrier's task is far easier: it need only raise a *presumption* that an exempted peril was the cause. If the damage could have been caused by one of the dangers listed in §608(1) (that is, the equivalents of Art 4 r 2(c) and (e)-(o)), that danger is *presumed* to have caused the damage.<sup>181</sup> It is then up to the plaintiff to prove that that exempted peril was not in fact the cause. That proof includes proving what the actual cause was. The §608(1) exemptions do not apply when the danger was caused by a situation created by the carrier.<sup>182</sup>

### 3 Written Notice

Art 3 r 6 and §611 provide that the plaintiff must notify the carrier of any damage in writing at the latest when the goods are delivered (or within three days if the damage is not apparent at delivery).<sup>183</sup> If the plaintiff accepts the goods and fails to give such notice, a presumption arises that the carrier has delivered the goods as required by the bill of lading. §611(3) provides for the further presumption that the damage was caused by someone/thing other than the carrier. This second presumption goes further than the Hague-Visby Rules.<sup>184</sup>

There is no need to give notice if the goods have undergone joint survey. However, under German law, joint survey must be under the supervision of the “competent authorities” or an “expert officially

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<sup>181</sup> §608(2).

<sup>182</sup> §608(3). §608(3) does not apply to the equivalents of Art 4 r 2(a), (b), (p) and (q), but the same effect is reached by the individual paragraphs, which provide for these exemptions (§607(2) for (a), (b); §606 for (p), (q)): see P 117. §608(3) cannot sensibly apply to the saving of lives exemption, or the carrier would never be exempted from liability for saving lives at sea, and there would be no point in having the exemption in the HGB in the first place. The same reasoning applies to the exemption for loss or damage caused by a deviation to save property at sea. The exemption from liability for loss or damage caused by a deviation to save life is justified by the fact that human life is more important than property. It is more difficult to justify the exemption for saving property. See P 116-7.

<sup>183</sup> §611 applies only to claims arising out of the carrier's liability under §§559 and 606 (seaworthiness and duty to carefully load, handle etc the goods) and does not apply where the goods have been lost: BGH VersR 74, 590 (“Saar”); P & R 535.

<sup>184</sup> If the receiver fails to give notice, it can still proceed against the carrier within the one year time limit, but it must rebut the presumption (two presumptions under the HGB) by proving that the damage was caused by the carrier.

appointed” for that purpose.<sup>185</sup> This is a stricter definition of joint survey than that found in the Hague-Visby Rules.<sup>186</sup>

#### 4 Time Bar

The carrier and the ship are protected from actions against them unless suit is brought within one year after the date of delivery of the goods (or the date when the goods should have been delivered). Art 3 r 6 provides that the carrier is “discharged from all liability whatsoever”, while §612(1) provides that the carrier will be free of “any liability for the goods”.<sup>187</sup> Under Australian law, the time bar applies only to actions related to the bill of lading.<sup>188</sup> In contrast, the application of the HGB time bar is very wide: it applies to any liability arising out of the carriage of goods – not just out of the bill of lading. Both time bars apply when there has been a breach of initial seaworthiness or the duty to carefully load, handle etc the goods, or a breach which falls outside the limited liability provisions, including economic loss.<sup>189</sup> Under both laws, the parties may agree to extend this period,<sup>190</sup> but not shorten it.<sup>191</sup>

#### 5 Delivery after Discharge

The Hague-Visby Rules apply only between loading and discharge. Art 3 r 6 is defined in terms of delivery, and delivery does not always

<sup>185</sup> §611(2).

<sup>186</sup> P 122 believes that the drafter erred in this regard when incorporating the Hague-Visby Rules into the HGB.

<sup>187</sup> The wording of this paragraph is in contrast to the wording in §559 (seaworthiness) “for the damage” and §606 (carefully load handle etc) “loss or damage of the goods” and §660, which limits liability only for “loss or damage of the goods”.

<sup>188</sup> *J Gadsen Pty Ltd v Australian Coastal Shipping Commission* [1977] 2 NSWLR 575; *The Captain Gregos* [1990] 1 Lloyd’s Rep 311 (CA); *The Captain Gregos (No 2)* [1990] 2 Lloyd’s Rep 395 (CA).

<sup>189</sup> Eg delay. Australia: *The Ot Sonja* [1993] 2 Lloyd’s Rep 435. Germany: P & R 508 (however, it does not apply to claims arising out of an incorrect or delayed issue of the bill of lading: P & R 542).

<sup>190</sup> Australia: Art 3 r 6. Germany: BGH VersR 70, 363 (“Wilhemine”).

<sup>191</sup> Australia: Art 3 r 8. Germany: P & R 545-6.

occur within the tackle to tackle period. Can Art 3 r 6 have an effect after discharge of the goods? If the bill of lading states that the receiver must take delivery of the goods once they have been freed of the ship's tackle, but that the carrier may have the goods stored if the receiver does not do so, Art 3 r 6 is effective and the time bar runs from the time the goods were freed of the tackle.<sup>192</sup> Where, however, the bill of lading does not provide that delivery occurs at discharge, there is some controversy as to the application of the time bar. Under English law, the time bar still applies.<sup>193</sup> In Australia, there are conflicting authorities, but the highest authority states that the time bar does not apply in this situation.<sup>194</sup>

The HGB applies (albeit not compulsorily) between acceptance and delivery. The carrier usually takes advantage of the fact that it can contract out of provisions of the HGB for the period after discharge. If it does not do so, the provisions of the HGB continue to apply.<sup>195</sup> It is unlikely that the carrier will contract out of a provision to its benefit (for instance, the §612 time bar). Therefore, the time bar will normally continue to apply to delivery after discharge. It depends upon how the parties have contracted.

## 6 Order and Burden of Proof

The order and burden of proof in claims for lost or damaged cargo is basically the same in each country. However, as discussed above, there is one very important difference that exists in the carrier's proof of an exemption. Under Australian law, the carrier must prove that the loss or damage was caused solely<sup>196</sup> (if indirectly)<sup>197</sup> by the exempted peril.<sup>198</sup> Under German law, the carrier must prove only that an exempted peril

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<sup>192</sup> D & D 307-8.

<sup>193</sup> *The Captain Gregos* [1990] 1 Lloyd's Rep 311.

<sup>194</sup> *NPL (Australia) Pty Ltd v Kamil Export (Aust) Pty Ltd* (unreported, Victorian SC (App Div), 1993).

<sup>195</sup> See P 121-2 and P & R 503.

<sup>196</sup> *Commonwealth v Burns Philp & Co* (1946) 46 SR (NSW) 307, 312-13.

<sup>197</sup> *Frank Hammond Pty Ltd v Huddart Parker Ltd* [1956] VLR 496, 498.

<sup>198</sup> The party relying on a defence must prove it: *The Antigoni* [1991] 1 Lloyd's Rep 209, 212.

occurred and that, in all the circumstances, the loss or damage could have been caused by that peril. The plaintiff can displace this exemption in one of two ways. First, by proving that the carrier breached its duty under Art 3 r 2 or §606 to carefully load, handle etc the goods.<sup>199</sup> Under Australian law, the carrier is liable for any defect in the loading, stowing etc, regardless of whether it performed those tasks. Under German law, the plaintiff must further conclusively prove that the loss or damage was caused by something other than exempted peril and prove what the actual cause was.<sup>200</sup> Secondly, by proving that initial unseaworthiness caused the loss or damage.<sup>201</sup> If this is shown, the carrier can nonetheless avoid liability if it proves that the unseaworthiness was not due to a lack of due diligence by it, or its employees, agents or independent contractors.<sup>202</sup> The carrier need not prove what the actual cause of the loss or damage was, provided it can show that it exercised due diligence.<sup>203</sup> There must be a causal link between the lack of due diligence and the damage caused: if the damage was caused by something else, the fact that the carrier did not exercise due diligence is irrelevant.<sup>204</sup>

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<sup>199</sup> Under Australian law, the carrier's exemptions under Art 4 r 2(a), (b) cannot be displaced by such proof: see D & D 283; *Shipping Corp of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142, 154 and 165.

<sup>200</sup> P & R 529. Displacing the carrier's liability in this way is only possible where the carrier actually performed those tasks.

<sup>201</sup> The proof need not be absolute, since the plaintiff may raise a presumption by inference that unseaworthiness was the likely cause of loss or damage (Australia: *The Tatjana* [1911] AC 194; *The Theodegmon* [1990] 1 Lloyd's Rep 52; *Commonwealth v Burns Philp & Co* (1946) 46 SR (NSW) 307, 312. Germany: HOLG Hamburg MDR 73, 1024; P & R 367).

<sup>202</sup> Australia: Art 4, r 1. Section 17 COGSA modifies the common law position by abolishing the requirement to imply a term in the contract of carriage that creates an absolute undertaking by the carrier to provide a seaworthy ship. Germany: the burden of proof is the same – see P & R 367. A certificate of seaworthiness can be used only as evidence and not as proof of seaworthiness: H Wüstendorfer, *Neuzeitliches Seehandelsrecht* (2 ed, 1950) 242-3.

<sup>203</sup> Australia: *The Antigoni* [1991] 1 Lloyd's Rep 209, 213. That case stands for the proposition that it will, however, be harder for the carrier if it cannot show the actual cause. Germany: RGZ 67, 300, HOLG HGZ 16, 84; P & R 367.

<sup>204</sup> Australia: *The Yamatogawa* [1990] 2 Lloyd's Rep 39. Germany: P & R 364.

## 7 Himalaya Clause and Extension of Carrier's Exemptions and Limitations to Servants

Under the Hague-Visby Rules and the HGB the carrier's liability is limited and excepted in a number of ways. Art 4 *bis* r 2 and §607a(2) provide that the carrier's defences and limitation of liability extend to a servant or agent of the carrier, "such servant or agent not being an independent contractor".<sup>205</sup> They do not therefore extend to an independent contractor. Nor do they apply to such a servant or agent if "the damage resulted from an act or omission of the servant or agent done with intent to cause damage, or recklessly and with knowledge that damage would probably result."<sup>206</sup>

A stevedore is an independent contractor and therefore not covered by the Rules or HGB. The Himalaya clause is inserted into a bill of lading to extend the carrier's defences and limitations to the stevedore.

The Himalaya clause has caused controversy in the common law world, mainly because of the problem of privity of contract – it is not possible to contract for the benefit of a stranger. It finally gained judicial acceptance in most Commonwealth jurisdictions, including Australia in *The New York Star*.<sup>207</sup> In that case, it was held that the carrier contracts *as agent* for the stevedore with the shipper, thus avoiding problems of privity. The judicial reasoning has however come under fire, mainly because it stretches the notion of agency and privity too far.<sup>208</sup>

<sup>205</sup> §607a HGB is almost identical to Art 4 *bis*. One difference is that the German text does not include the limitation "such servant or agent not being an independent contractor". This is probably of little consequence since the HGB paragraph will be read in light of the Hague-Visby Rules. See P 164; P & R 517; cf R Herber *Das neue Haftungsrecht der Schifffahrt* (1989) 199.

<sup>206</sup> Art 4 *bis* r 4 and §607a(4). According to Australian law, the test is a subjective one, ie it must be proved that the servant or agent either *subjectively intended* to cause the damage, or *actually knew* that damage would *probably* be caused by its recklessness (*SS Pharmaceutical Pty Ltd v Qantas Airways Ltd* [1991] 1 Lloyd's Rep 288 (NSW SC CA)). The HGB aside, German law has no equivalent level of liability. A problem arises in its definition and it is difficult to know whether the test is subjective or objective (P 156-7; P & R 522-4).

<sup>207</sup> (1980) 144 CLR 300.

<sup>208</sup> See L Rief "A comment on *ITO Ltd v Miida Electronics Inc* – the Supreme Court of Canada, Privity of Contract and the Himalaya Clause" (1988) 26 Alberta Law Review 372.

There is no privity of contract problem under German law. There is therefore no problem in contracting for the benefit of a third party.<sup>209</sup> Provided the *Befrachter* and carrier have agreed to the Himalaya clause, it is valid.<sup>210</sup>

## V CONCLUSION

The aim of this article was to discover what differences and similarities exist between the legal regulation of carriage of goods by sea under bills of lading in Australia and Germany. The three most important commercial differences concern the limited liability regimes of the Hague-Visby Rules and the HGB. They are the definition of “perils of the sea”; the extent of the carrier’s liability; and the order and burden of proof in a cargo claim.

“Perils of the sea” is given a very broad definition under Australian law – it includes even foreseeable and avoidable perils. German law takes the diametrically opposite view – the peril must be both unforeseeable and unavoidable.

Under German law, the carrier is liable “for the damage” caused by initial unseaworthiness (§559) and is freed of liability “for the damage” if it can show due diligence. It is liable only for “loss or damage of the goods” caused by a breach of §606 (carefully load, handle etc). Its liability is limited only for “loss or damage of the goods” under §660. The §608(1) exemptions from liability apply only to “loss or damage of the goods”. By contrast, Australian law knows only one degree of damage and liability – “loss or damage to or in connection with the

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<sup>209</sup> §328 HGB. See P & R 519.

<sup>210</sup> P & R 519. However, controversy arises where there was no such agreement between the parties. There is a general principle of German law that contracting parties have a duty of loyalty to each other. The carrier breaches this duty of loyalty by worsening the position of its contracting partner in limiting and exempting the stevedore’s liability. The Himalaya clauses should be invalid in such a case according to P 164. P & R 519 argue that the Himalaya clause is neither a breach of that principle nor a breach of § 9 AGBG. P 164 accepts, however, that where the carrier is forced to use a stevedore (because of state-run harbours) who imposes a Himalaya clause, it will be valid because the carrier and the shipper could not do anything about it – without the stevedore there could be no carriage.

goods”. That is not the same as any of the German degrees – it is narrower than §559 but broader than §§606, 608(1) and 660. Under both laws, if the plaintiff fails to bring suit before the time bar, *all* the carrier’s liability is excluded.

Under Australian law, the party relying on an exemption must prove it. The burden of proof is reversed under German law – the carrier need only demonstrate the existence of an exempted peril and the *possibility* that the peril caused the loss or damage. That is enough to raise the presumption that the peril was *actually* the cause. To rebut this presumption, the plaintiff must *conclusively* prove what the real cause was.

Considering these, and the other differences discussed in the body of the article, it is in the interests of parties before an Australian court – if the court is applying German law – to discover what these differences are and to prove them to the court. A court in Germany – if applying Australian law – will discover the differences for itself.