
Practical Aspects of the Law Relating to Carriage of Goods

Auckland District Law Society
Continuing Legal Education
Seminar

Geoff Mercer
*(Barrister and Solicitor of the High Court of New
Zealand)*

and

Paul Myburgh
*(Senior Lecturer, Department of Commercial Law,
University of Auckland)*

30 May 1995

1 INTRODUCTION

This paper discusses three preliminary questions which have to be answered in any situation involving potential liability for loss of, or damage to goods. The first is a demarcation question: which of the carriage of goods regimes governs the incident in which loss or damage occurred? The resolution of this issue is crucial, as each regime has different substantive provisions. The second question is: who has the right to sue under the relevant carriage regime? The third question is: who incurs liability under the relevant carriage regime? While the answer to the last question may be relatively simple in some cases, it may cause difficulties in situations involving more than one carrier, or where the carrier's identity is not entirely clear to the plaintiff.

The issue of limitation is then examined. In each of the three regimes there are, in general terms, two kinds of limitation in respect of claims for lost or damaged goods. They are limitation of liability; and limitation of action.

The first of these is more conveniently referred to as package or unit limitation and the second as a time bar. As each regime has different provisions for applying these limitations it is helpful to look at them separately. Also, as a unit limitation or a time bar is often the only kind of defence that a carrier might have, and as they may prevent a goods owner from recovering in full on what would otherwise be a valid claim against a carrier, it becomes important to determine which regime is applicable to the loss or damage complained of. The results of applying unit limitations and time bars under the different regimes can be significantly different.

Finally, some basic jurisdictional and choice of laws issues, which arise frequently in international carriage situations, are discussed in the context of the different carriage regimes.

2 WHICH REGIME GOVERNS?

2.1 CARRIAGE OF GOODS ACT

The Carriage of Goods Act 1979 is clearly intended to be a code governing all domestic carriage of goods in New Zealand.¹ In

¹ Until 1 February 1995, the Act also governed international carriage of goods between New Zealand and the Cook Islands, Niue, or Tokelau: see section 5(5) of the Carriage of Goods Act, repealed by section 212 of the Maritime Transport Act 1994.

accordance with this intention, section 5(1) provides that the Act applies “to every carriage of goods, not being international carriage, ... whether the carriage is by land, water, or air, or by more than one of these modes”. The Act also applies where goods are carried as an incidental part of passenger services, and the definition of goods in section 2 expressly includes passengers’ baggage. The Act equally covers domestic carriage of goods on ships or aircraft which are simultaneously engaged in international carriage; so, for example, the Act will cover coastal cargo carried by transiting foreign ships under section 198 of the Maritime Transport Act 1994.

In *Fletcher Panel Industries Ltd v Ports of Auckland Ltd*² it was argued that section 5(1) excludes from the ambit of the Act not only international carriage, but also domestic cargo handling which is closely connected with international carriage (in this case, storage on the wharf prior to loading for international sea carriage) and which therefore ought to be characterised as services incidental to international carriage, rather than as domestic carriage. Hillyer J. rejected this argument, on the basis that section 2 defines international sea carriage as “commencing when the goods are loaded onto a ship, and ending when they are discharged from a ship”. Instead, his Honour adopted I.M. Mackay’s analysis³ that the line of demarcation drawn by the Act between domestic carriage and international sea carriage is the ship’s hook.

The *Fletcher Panel* decision therefore confirms that all cargo handling in New Zealand prior to loading or subsequent to discharge is governed by the Carriage of Goods Act, regardless of whether this forms part of a broader contractual arrangement for international sea carriage or international multimodal transport – a result which is certainly consistent with the overall scheme of the Act. It follows that any attempt by the international contracting carrier to limit or exclude its liability in respect of cargo handling or storage in New Zealand will be invalid unless it complies with the requirements of the Carriage of Goods Act.⁴

² [1992] 2 NZLR 231.

³ In *W. Tetley Marine Cargo Claims* (1988, Editions Blais, Montreal) 1072. Cf. the Hague-Visby Rules, Article 1(e); *Pyrene v Scindia Navigation Co* [1954] 2 QB 402.

⁴ So, for example, Himalaya clauses in bills of lading, (although permissible under the Hague-Visby Rules because they relate to liability for cargo handling outside of the period of sea carriage) would seem to fall foul of the Act if they do not meet the requirements of a “declared terms” contract under section 8: see *Fletcher Panel*, above n 2, 235.

The demarcation line between international air carriage and domestic carriage is not as clear-cut. Section 2 of the Carriage of Goods Act does provide a definition of international carriage which replicates Article 1(2) of the Warsaw Convention (discussed below in part 2.3), but the section does not spell out when international air carriage commences or ends. However, article 18 of the Warsaw Convention itself, which sets out the carrier's liability for loss of, or damage to goods occurring during the period of carriage by air, provides that:

- (2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.
- (3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

Article 18 does little to clarify the ambit of international carriage by air under the Convention, because of divergent interpretations of exactly when the goods are "in charge of the carrier". International air carriage is usually deemed to commence when the goods are received by the carrier or its agents and an air waybill is issued, and to end either on the goods' arrival at the airport of destination, or on their release to the consignee after they have cleared customs. Where the contract of carriage specifies collection or delivery at the consignee's address, land carriage from or to that address will presumably come within the scope of the Convention because it is performed for the purpose of loading or delivery.⁵

There is thus considerable scope for conflict between the domestic carriage regime in the Carriage of Goods Act and the Warsaw Convention regime; particularly as both are mandatorily applicable in their own terms. A simple solution would be to treat all handling of international air cargo before loading and after arrival as domestic carriage subject to the Carriage of Goods Act. This approach, which echoes the *Fletcher Panel* decision, would at least ensure that

⁵ See generally the discussions in Shawcross & Beaumont, *Air Law*, loose-leaf, Butterworths, Division VII, paras 179.1-3; C.P. Verwer, *Liability for Damage to Luggage in International Air Transport*, Kluwer, 1986, 25-27; W. Robinson & P. Barlow, *Aviation Law*, Auckland District Law Society CLE Seminar Paper, 1989, pp. 4.7.5-4.7.6.

demarcation of international air carriage and sea carriage are dealt with on a uniform basis. However, this approach would seem to be in fundamental conflict with Article 18 of the Convention, as well as Article 1(3), which provides that carriage by successive air carriers “does not lose its international character” merely because part of the carriage is domestic (see part 4.3 below). Another approach, which would avoid this conflict, would involve determining when carriage by air ends under the Warsaw Convention on a case by case basis, and then applying the Carriage of Goods Act to any domestic carriage beyond that. This approach is also unsatisfactory, as it undermines the status of the Carriage of Goods Act as a code applicable to all domestic carriage in New Zealand.

2.2 HAGUE-VISBY RULES

The Hague-Visby Rules⁶ will apply where the following requirements are met:

- (1) the contract of carriage is covered by a bill of lading or similar document of title (Article 1), or by a non-negotiable document (for example, a sea waybill) which expressly incorporates the Hague-Visby Rules according to the formula in section 209(2) of the Maritime Transport Act 1994;
- (2) the carriage of goods covered by the bill of lading or other document is between ports in two different States (Article 10); and
- (3) one of the three criteria in Article 10 of the Rules is satisfied:
 - (a) the bill of lading has been issued in a Contracting State;
 - (b) the goods have been carried from a port in a Contracting State; or
 - (c) the contract contained in or evidenced by the bill of lading provides that the Rules, or legislation giving effect to them (e.g., the Maritime Transport Act 1994), are to govern.

⁶ The Hague Rules as amended by the Visby and SDR Protocols are set out in Schedule 5 of the Maritime Transport Act 1994. Section 209(1) of the Act provides that the Rules have “the force of law in New Zealand”.

As mentioned above, the Rules cover the period from the time when goods are loaded on to the ship until the time when they are discharged from the ship (Article 1(e)).

2.3 WARSAW CONVENTION

The Warsaw Convention⁷ applies to international carriage of goods, as well as to international carriage of persons, irrespective of the nationality of the aircraft performing the carriage. Article 1(2) of the Convention defines international air carriage as meaning:

any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

It is worth noting that, as New Zealand signed the Warsaw Convention on behalf of Tokelau, the Cook Islands and Niue, we are regarded as a single High Contracting Party. Air carriage of goods between New Zealand and these countries is therefore not international carriage in terms of the Warsaw Convention, unless there is an agreed stopping place in a third country. Section 5(5) of the Carriage of Goods Act 1979 deemed carriage between New Zealand and these countries to be domestic carriage governed by the Act, but this provision was repealed by the Maritime Transport Act 1994 on 1 February 1995. Air carriage between New Zealand and Tokelau, the Cooks or Niue would therefore appear to be governed by the common law, a result which is less than satisfactory and is no doubt unintended.

As discussed above in part 2.1, Article 18 of the Convention extends the definition of carriage by air for the purposes of the carrier's liability for loss of, or damage to goods, to include the entire period when the goods are in the carrier's charge.

3 WHO HAS THE RIGHT TO SUE?

⁷ The Warsaw Convention as amended by the Hague Protocol, and the Guadalajara Convention are set out in Schedules 1 and 2 of the Carriage by Air Act 1967. Section 7(1) of the Act provides that the Conventions have "the force of law in New Zealand".

3.1 CARRIAGE OF GOODS ACT

Under section 9 of the Carriage of Goods Act, the contracting carrier is primarily liable to the “contracting party”, which may either be the consignor or the consignee, depending on who contracted for the carriage. Section 20 allows a consignee who is not the contracting party to sue the contracting carrier for loss or damage if property in the goods has passed to the consignee. The consignee is then:

- (a) ... deemed to be the contracting party and [is] entitled to sue and recover under the contract accordingly:
- (b) The contracting carrier shall be entitled to raise the same defences and to make the same counterclaims as he [or she] would have been entitled to raise or make if the action had been brought against him [or her] by the contracting party.

As passing of property triggers the non-contracting consignee’s right of suit against the carrier, problems may arise in cases where the risk of loss or damage has already passed to the consignee, but property has not. In such cases, the consignee will be forced to rely on the co-operation of the contracting consignor.⁸

3.2 HAGUE-VISBY RULES

Generally speaking, the person entitled to sue on a bill of lading or similar document governed by the Hague-Visby Rules will be:

- (a) the lawful holder of the bill of lading;
- (b) the consignee identified in a sea waybill as being entitled to delivery; or
- (c) the person who is entitled to delivery of goods specified in a ship’s delivery order.

Section 13B(1) of the Mercantile Law Act 1908 provides that, by virtue of falling into one of these categories, the person shall have “transferred to and vested in him or her all rights of suit under the contract of carriage as if that person had been a party to that contract”.

3.3 WARSAW CONVENTION

⁸ This is subject to any argument that the non-contracting consignee may take advantage of its rights as a beneficiary under the Contracts (Privity) Act 1982. Such an argument would have to overcome section 6, the codification provision in the Carriage of Goods Act: see part 5.1 below.

The Warsaw Convention expressly confers rights on the consignor and consignee. Article 12 sets out the consignor's right of disposal of the cargo and stoppage in transitu, and Article 13 sets out the consignee's right to delivery. Article 14 of the Convention provides that the consignor and consignee can respectively enforce all of these rights, each in their own name, whether acting in their own interest or the interest of another, provided that they carry out the obligations imposed by the carriage contract.

In *Tasman Pulp & Paper Co Ltd v Brambles JB O'Loghlen Ltd*,⁹ the issue was whether a party other than the consignor or consignee was entitled to sue the carrier under the Warsaw Convention. The carrier argued that the goods owner's action against it should be struck out, because Article 24 of the Convention provides that actions for loss of, or damage to goods or delay may only be brought subject to the conditions and limits set out in the Convention. These limits were said to include Article 14, which should be interpreted restrictively as describing a closed code of rights available only to the consignor and consignee. Here, the goods owner was not named in the air waybill. Prichard J. held, against the weight of overseas authority, that Article 14 should rather be read as an enabling provision, allowing the consignor and consignee to exercise Convention rights under Articles 12 and 13 which they did not possess at common law. His Honour declined to construe the Convention in a way that would deprive the goods owner of its common law right to sue the carrier.

Prichard J.'s conclusions in *Tasman Pulp* were adopted by the English High Court in *Gatewhite Ltd v Iberia Lineas Aereas de Espana Sociedad*.¹⁰ In deciding *Gatewhite*, Gatehouse J. concurred with Prichard J.'s view that it would be curious and unfortunate if the goods owner's right to sue was dependent on the ability and willingness of the consignee to take action against the carrier, especially as one might be dealing with a nominal consignee, such as a customs clearing agent, a forwarding agent, or the buyer's bank.

4 WHO INCURS LIABILITY?

4.1 CARRIAGE OF GOODS ACT

⁹ [1981] 2 NZLR 225, discussed in Shawcross & Beaumont, *Air Law*, Division VII, para. 188.

¹⁰ [1989] 1 All ER 944, [1989] 1 Lloyd's Rep 160, noted by Reynolds, [1989] LMCLQ 37.

The Carriage of Goods Act draws a basic distinction between the contracting carrier, who enters into the contract of carriage with the goods owner, whether as a principal or as an agent for another carrier; and the actual carrier or carriers, who perform the carriage or any part of it, or any incidental carriage services. The two definitions are not exclusive: in simple carriage situations involving only one carrier, the same party will be both contracting carrier and actual carrier. Section 9 of the Act provides that the contracting carrier is liable to the goods owner for loss of, or damage to goods throughout the period of domestic carriage, irrespective of whether the contracting carrier or another actual carrier was responsible for the goods at the time when loss or damage occurred. Section 10 states that, in a situation which involves both a contracting carrier and one or more other actual carriers, the latter are primarily liable to the contracting carrier, rather than to the goods owner, for loss or damage occurring while they were separately responsible for the goods.

By creating this two-tier scheme, the Act seeks to simplify liability in most multi-carrier situations by allowing the goods owner to sue only the contracting carrier, regardless of the circumstances in which loss or damage occurred. The Act favours the goods owner, however, in the sense that the owner's right of recourse against the contracting carrier is insulated from liability disputes between the contracting carrier and any actual carrier(s), or arguments about exactly when, where or how the loss or damage occurred during carriage.

There are two exceptions to this general scheme. The first is where the contracting carrier is insolvent or cannot be found. Section 11 then allows the goods owner to sue the actual carrier(s) directly. The goods owner has the same rights of recourse against the actual carrier(s) as the contracting carrier would have had under section 10. In these circumstances, all of the actual carriers will be jointly liable to the goods owner, unless they can prove that damage or loss occurred other than when they were separately responsible for the goods. The quality of protection afforded to the goods owner by section 11, however, depends entirely on the nature of the contractual arrangement which was entered into between the contracting carrier and actual carriers. Where this arrangement was, say, on declared terms which excluded or severely restricted the actual carriers' liability vis-à-vis the contracting carrier, the goods owner may find itself without an effective remedy.¹¹ The second exception is where the actual carrier intentionally caused

¹¹ See M. Easton "Sub-contracts for the Carriage of Goods – Section 10 of the Carriage of Goods Act 1979" (1981) 11 VUWLR 275, 282-292.

the loss or damage. In this situation, the goods owner retains its common law right to sue the actual carrier directly in tort or bailment.¹²

The general two-tier liability scheme discussed above does not apply to contracts of successive carriage by air; that is, carriage performed by two or more carriers in successive stages, which is regarded by the parties as a single operation. Liability of successive carriers is governed by section 13, which provides that they are jointly and severally liable, unless they can prove that damage or loss occurred when they were not separately responsible for the goods.

4.2 HAGUE-VISBY RULES

The Hague-Visby Rules do not draw a distinction between the contracting carrier and actual carriers. Article 1(a) of the Hague-Visby Rules defines the term “carrier” as including “the owner or the charterer who enters into a contract of carriage with a shipper”. This inclusive definition does not resolve uncertainties which may arise in respect of the carrier’s identity where goods are carried on board a chartered vessel, or address the issue of the effect of demise or identity of carrier clauses in bills of lading.¹³

4.3 WARSAW CONVENTION

Like the Hague-Visby Rules, the Warsaw Convention simply refers to the “carrier”, and does not distinguish between contracting and actual carriers in the way that the Carriage of Goods Act does. The Convention does, however, have several special provisions which apply to successive air carriage, which is deemed by Article 1(3) to be undivided carriage “if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State”. Article 30(1) deems successive carriers to be parties to the carriage contract in so far as it deals with the carriage performed under their supervision, and makes successive carriers subject to the Convention. Article 30(3) gives the consignor a right of action against the first carrier, and the consignee

¹² See the Carriage of Goods Act, section 6; part 5.1 below.

¹³ On which, see *The Berkshire* [1974] 1 Lloyd’s Rep 185; *The Vikfrost* [1980] 1 Lloyd’s Rep 560; *The Jalamohan* [1988] 1 Lloyd’s Rep 443. The effect of these controversial clauses assumes significance in New Zealand now that local cargo interests no longer enjoy the protection of section 11 of the Sea Carriage of Goods Act 1940.

a right of action against the last carrier, and each a right of action against the carrier who performed the carriage during which the loss or damage occurred.¹⁴ The specified carriers incur joint and several liability.

The Guadalajara Convention, which was designed to supplement the Warsaw Convention, was formulated specifically to deal with international air carriage performed by neither the contracting carrier nor successive carriers. Article 1 of the Guadalajara Convention distinguishes between the contracting carrier, which is defined as the person who enters into the contract of international air carriage governed by the Warsaw Convention; and the actual carrier, which is defined as “a person, other than the contracting carrier,¹⁵ who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage ... but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention.” Where goods are lost or damaged while being carried by the contracting carrier, only the contracting carrier is liable under the Warsaw Convention. Where loss or damage occurs during carriage performed by the actual carrier, however, the effect of the Guadalajara Convention is to render both the contracting and actual carriers liable according to the provisions of the Warsaw Convention. Article 8 of the Guadalajara Convention allows the goods owner to elect to institute separate or joint proceedings against the contracting carrier, or the actual carrier, or both. If the goods owner elects to sue only one of the carriers, the defendant can require the other carrier to be joined in the proceedings in accordance with the procedural rules of the *lex fori*.

Do the abovementioned Articles in the Warsaw and Guadalajara Conventions form a code determining who may be held liable for claims covered by the Conventions? This issue is raised by the recent case of *Emery Air Freight Corporation v Nerine Nurseries Ltd*,¹⁶ which involved damage to tulip bulbs carried from Palmerston North to Amsterdam by a series of carriers. While finding that the goods owner had not established at first instance that the carrier (the second of three carriers) was liable to it as the carrier under the Warsaw Convention, or as the contracting carrier under the Guadalajara Convention,

¹⁴ See further *Emery Air Freight Corporation v Nerine Nurseries Ltd*, Unreported, High Court Wellington, AP 144/94, Eichelbaum CJ.

¹⁵ Unlike the Carriage of Goods Act, therefore, the Guadalajara Convention definitions of contracting and actual carrier are mutually exclusive.

¹⁶ Unreported, High Court, Wellington, AP 144/94, 10 February 1995, Eichelbaum CJ.

Eichelbaum CJ nevertheless held that the carrier was liable to the goods owner at common law as a sub-bailee. His Honour, citing *Tasman Pulp* and *Gatewhite* (discussed above in part 3.3) held that the Conventions do not deprive a goods owner of the right to sue at common law, and, applying a line of authority on sub-bailment¹⁷ to the facts of the case, reached the conclusion that the carrier was liable as sub-bailee to the owner to exercise due care for the goods while they were in its custody, or that of its servants or sub-contractors.

With respect, this reasoning seems to conflate two distinct issues:

- (a) who has rights of suit in respect of a Convention claim? and
- (b) who is liable in respect of a Convention claim, and what is the extent of their liability?

With regard to issue (a), *Tasman Pulp* and *Gatewhite* are authority for the proposition that Articles 12, 13, 14 and 24 of the Convention do not exhaustively determine who has rights of suit – the list of potential plaintiffs may therefore be supplemented by the common law. It does not necessarily follow from this proposition that other Articles in the Warsaw and Guadalajara Conventions which identify the liable carrier and fix the scope of its liability were not intended to be treated as a code. Indeed, the overall scheme of the Warsaw Convention, and the way in which it was supplemented by the Guadalajara Convention to ensure complete coverage of different carrier arrangements, suggest the opposite. At the very least, a careful examination of the wording of the official French text of the Conventions and the *travaux préparatoires* would seem to be called for, before one may confidently conclude that independent substantive common law causes of action (as opposed to merely common law rights of suit subject to the Conventions' scheme of causes of action) survive the Conventions. *Emery Air Freight* has profound implications both for the air carriage industry and the status of the Warsaw Convention scheme as a uniform international liability regime. It remains to be seen whether the decision will be followed in future.

5 LIMITATION OF LIABILITY

5.1 CARRIAGE OF GOODS ACT

¹⁷ *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716; *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 WLR 1262; *The Pioneer Container* [1994] 2 AC 324.

The unit limitation contained in the Carriage of Goods Act 1979 is fundamental to the whole working of the Act. The basic scheme of the Act is to provide for strict liability for loss of, or damage to goods in exchange for the right to limit liability under the Act.

The current value of the limitation is \$1,500 for each unit lost or damaged.¹⁸ This limitation applies to claims by a contracting party against a contracting carrier as well as claims by the contracting carrier against the actual carriers responsible for the loss or damage. Where more than one actual carrier is liable the limitation applies to their joint liability so that in any case the total liability of all carriers for each unit carried will be \$1,500.

Section 15(2) sets out three situations where the limitation will not be available. They are:

- a) where the carrier intentionally causes the loss;
- b) for loss or damage arising out of the contract of carriage, other than for loss or damage to the goods; and
- c) for liability under the contract of carriage for consequential loss.

Intentional loss

There is no question that, where the carrier personally causes the loss, the limitation will not be available. The policy reasons for this are obvious. The term "carrier" refers to the person entering into a contract of carriage. Where that person is a company, it is likely that the loss will be seen to have been caused by the carrier where someone in a position of ultimate responsibility in the carrying company, or its alter ego, is directly implicated in the loss complained of.¹⁹

If a carrier intentionally causes the loss, there are two consequences. First, the carrier loses the right to limit liability under section 15 of the Act. Second, the carrier is no longer able to claim the protection of the Act as a code and the owner of the goods, or some other party suffering

¹⁸ The unit limitation provisions of the Act are contained in section 15.

¹⁹ See, in respect of sea carriage, *The "European Enterprise"* [1989] 2 Lloyd's Rep 182; *Scrutton on Charterparties and Bills of Lading*, 19th edition, 1984, 480 n. 27.

loss as a result of the loss of, or damage to the goods, can sue the carrier at common law for the loss.²⁰

In a three party or more transaction, where there is a contracting party, contracting carrier and one or more actual carriers, the Act is not entirely clear as to whether, when an actual carrier intentionally causes the loss, the contracting carrier loses the right to limit as well. On one interpretation, the section appears to prevent only the culpable carrier from limiting its liability. This is on the basis that section 15(2)(a) refers to loss caused by “the carrier” presumably referring to the carrier who is seeking to come within paragraphs (a) to (d) of subsection (1) to secure the right to limit its liability. This is consistent with the reference later in subsection (2) to “the contract”, which can only refer to one contract between two of the parties to a multi-party transaction.

In a situation where, say, an actual carrier intentionally causes the loss, this interpretation results in the contracting carrier retaining the right to limit its liability against the contracting party. All is not lost for the contracting party, however, as it retains the ability to sue the defaulting actual carrier at common law in tort or bailment.²¹

However, this has the effect of shifting the risk of finding the offending actual carrier, suing him or her to judgment and enforcing judgment, on the goods owner rather than on the contracting party who is the one that elected to deal with the offending carrier in the first place and is best placed to guard against such losses. This is not consistent with the general operation of the Act which enables the contracting party to deal with, and look to, only the contracting carrier. A purposive interpretation based on these sound policy reasons, might, therefore, have the effect of eliminating the right of all carriers to limit if any one of the carriers involved in the transaction intentionally causes the loss.

Also unclear is the situation where an employee of the carrier intentionally causes the loss. This situation should not fall within the intentional loss exception in section 15(2)(a) because an employee, as has already been stated, is not likely to be considered as one and the same as the carrier. However, in the case of *Seiko Australia v Computer Transport Services* the District Court held that a goods owner who

²⁰ See section 6 of the Act referred to in more detail below.

²¹ To sue in bailment the goods owner will need to establish a sub-bailment between it and the offending actual carrier: see *The Pioneer Container* [1994] 2 AC 324.

suffered loss as a result of theft by the carrier's employee could avoid the limitation provisions by suing at common law.²²

In this case the plaintiff goods owner relied on section 6 of the Act which is the section that seeks to make the Act a code for the carriage of goods within New Zealand. Section 6 provides that:

Notwithstanding any rule of law to the contrary, no carrier shall be liable as such, whether in tort or otherwise, and whether personally or vicariously, for the loss of or damage to any goods carried by him [or her] except –

- (a) In accordance with the terms of the contract of carriage and the provisions of this Act, or
- (b) Where he [or she] intentionally causes the loss or damage.

Judge Morris in the *Seiko* case, basing his decision both on what he saw to be the plain meaning of the Act and the background material to the legislation, decided that “intentionally causes the loss or damage” included both the situation where the carrier personally causes the loss and where at common law he or she would be vicariously liable for an employee who has intentionally caused the loss.²³

It is difficult to see how the natural meaning of the Act could extend the intentional loss exception to the intentional acts of employees. Section 6 refers to vicarious liability, but this is in the context of excluding liability for claims in tort in respect of personal or vicarious liability. There is no indication that situations of vicarious liability were also intended to be read into the intentional loss exception. The words of the exception itself simply do not allow this. This interpretation, contrary to the decision in the *Seiko* case, is consistent with the intentional loss provision in section 15 and with section 16 of the Act which exonerates employees from any liability to the goods owner unless the employee intentionally caused the loss. It is also consistent with the overall policy of the Act.

²² [1992] DCR 762.

²³ Although it was not in issue in the decision itself, the *Seiko* case highlights the question; when will an employer be liable for the dishonest actions of an employee where the employer is not a party to those actions? The Judge considered the situation in that case to be “a classic [one] where the master (the carrier) is vicariously liable for the tort of his servant (the driver)”; page 768. For a discussion of this issue see Todd, *The Law of Torts in New Zealand*, 1991, 808-810.

The Carriage of Goods Act is clearly meant to be a code, excluding all common law liability. This is not inconsistent with providing an exception that prevents an intentional wrongdoer from limiting its liability under the Act. This exception for intentional wrongdoing by the carrier personally is also found in the Hague-Visby Rules and the Warsaw Convention.²⁴ Such an exception is to be expected. However, the policy reasons behind this exception do not apply where the wrongdoer and the person liable are separate, as in the case of intentional wrongdoing by an employee.

Unit

Having established that in all but exceptional case the unit limitation of \$1,500 is going to apply, it is then necessary to look to see what the unit of goods will be. This is determined by section 3 which defines the unit in a number of different situations, covering both bulk cargo such as bulk liquids in tankers, grain and coal, and unitised cargo such as cargo stuffed in containers or carried on pallets or in boxes. The time for determining the unit is set out in section 3(2) as being when the goods are accepted by the first actual carrier.

In the case of *Freightways International Ltd v Alliance Freezing Co (Southland) Ltd*,²⁵ it was argued by the carrier that section 3(2) could be read as meaning when the goods are accepted by the first actual carrier on the domestic leg of the carriage where the contract of carriage contemplates both domestic and international carriage. It was said that this was consistent with the policy of the Act which was to regulate domestic carriage only. This argument was rejected by Fraser J. who considered that there was nothing in the Act limiting the phrase "first actual carrier" to the first such carrier in New Zealand. Accordingly, he found that the unit for limitation purposes in that case was the individual bales of stockinette that were received under the contract of carriage in Hong Kong and then stuffed into a container for carriage by sea and then by land to its destination in New Zealand.

Applying the *Freightways* case means that any given carrier cannot be sure that the unit it receives for carriage is the unit that will apply for limitation purposes. This is so whether the carriage is either wholly domestic or also involves an international element. There are, however, sound policy reasons why the *Freightways* decision should be followed

²⁴ See Hague-Visby Rules, Article 4(5)(e) and Warsaw Convention, Article 25.

²⁵ Unreported, High Court Invercargill, AP 56/88, 21 September 1989, Fraser J.

if the scheme of the Act is taken into account. It is to be assumed that the contracting carrier will know in what form the goods are to be delivered to it or to the first actual carrier for carriage. The consignor does not necessarily know in what subsequent forms of packaging the goods will be carried. If subsequent actual carriers are concerned that they may be liable for a greater number of units of goods than they appear to be receiving, they are in a position to limit their liability in their contract with the contracting carrier. A simple clause to the effect of:

Notwithstanding the provisions of section 3(2) of the Carriage of Goods Act 1979, for the purpose of determining the limit of liability of the [actual carrier], the limit of liability prescribed by section 15 of the Act in respect of each unit of goods relates to the unit of goods as accepted for carriage by the [actual carrier] whether or not the unit has been previously, or is subsequently, packed, repacked or unpacked, or otherwise aggregated with or segregated from any other goods at any stage of the carriage.

A question of a different kind arose in *Wills v Wolters Cartage*.²⁶ In that case cartons of cigarettes had been loaded onto the carrier's truck. Some were on stretch-wrapped pallets and others were stacked on pallets, but not stretch-wrapped. The question for the Court was, what was the unit accepted for carriage?

There was no dispute that each of the stretch-wrapped pallets constituted a "unit of goods" under section 3, but the difficulty arose in respect of the remaining loose cartons stacked on the pallets. The Court of Appeal held that goods were accepted for carriage from when they are under the carrier's control of responsibility. This will be a question of fact in each case. On the particular facts of *Wills*, the Court held that in respect of the cartons loosely stacked on the pallets, the individual cartons constituted the "unit of goods".

Although this analysis appears to rely on the physical movement of the goods, a closer reading of the decision reveals that the understanding of the parties played a significant part. The Court held that, even if the pallets on which the loosely stacked cartons were loaded had been placed on the tray of the carrying vehicle, the parties nevertheless understood that these cartons were to be accepted for carriage as individual units. It was said that the cartons "were presented to the driver on pallets because these were convenient platforms for their transport from the factory to the loading bay by fork hoist". If this

²⁶ [1991] 3 NZLR 119 (HC); Unreported, Court of Appeal, CA 160/91, 17 February 1993, Casey, Hardie Boys, McKay JJ.

approach is followed in future, then the moment goods are “accepted for carriage” will be determined by rather more subjective factors.

5.2 HAGUE-VISBY RULES

The provisions for the limitation of liability for the international carriage of goods by sea are contained in Article 4(5) of the Hague-Visby Rules as scheduled to the Maritime Transport Act 1994.

Article 4(5) provides for two methods of calculating the value of the limitation, with the higher of the two applying. Limitation is to be calculated on the number of packages or units, or on the weight of the goods. The value of the limitation is 666.67 units of account for each package or unit or 2 units of account for each kilogramme of the gross weight of the goods lost or damaged. The unit of account is the Special Drawing Right used by the International Monetary Fund and has a current value of approximately NZ\$2.35. This has the effect that the package limitation will be determined by the weight of the goods if the relevant package or unit weighs more than a third of a tonne. The weight of the container or other package is also to be included in this calculation if it is lost or damaged.

The Hague-Visby Rules are not as specific as the Carriage of Goods Act appears to be when it comes to determining what the relevant package or unit will be. There is no comprehensive definition in the Rules as there is in section 3 of the Act. However, Article 4(5)(c) states that:

Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed to be the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

This sets out expressly the position that the law had effectively developed to in some jurisdictions under the previous Hague Rules.²⁷ It is common in some forms of bills of lading for there to be an express clause stating that the container or pallet is to be the package for limitation purposes. This clearly contradicts Article 4(5)(c) and where the Hague-Visby Rules are applicable by force of law,²⁸ such a

²⁷ See *PS Chellaram & Co Ltd v China Ocean Shipping Co Ltd* [1989] 1 Lloyd’s Rep 413, 424-428 (SC (NSW)); and U.S. and Canadian cases cited in *Carver on Carriage of Goods by Sea*, 13th ed, 1982, 391-400, M Davies & A Dickey *Shipping Law* (Law Book Co, Sydney, 1990) 211-212.

²⁸ See part 7.2.

provision will be of no effect due to the operation of Article 3(8) of the Rules. Article 3(8) strikes down any provision in a bill of lading that lessens the carrier's liability beyond that contained in the Rules.

Different considerations come into play when the Rules operate other than by force of law. In this situation, where the Hague-Visby Rules have been incorporated into the contract of carriage, there is a direct conflict between Article 3(8) and the kind of clause referred to. It is likely that the provision in the contract expressly identifying the package or unit for limitation purposes would prevail over Article 3(8). This is on the basis that express terms override general provisions incorporated into the contract.

Under the Hague-Visby Rules the carrier is also prevented from limiting its liability where it is proved by the claimant that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with the knowledge that damage would probably result.²⁹ It seems conceptually attractive that this provision should be limited to the acts and intention of the carrier, and should not extend to the acts of employees and agents.³⁰

Deck Carriage

In the previous section we looked at where the carrier will be deprived of the right to limit liability by virtue of the operation of the provisions of the Rules. There may also be circumstances, however, where the carrier will be deprived of the right to limit liability in circumstances that do not come within the limited intentional loss exception. Loss of the right to limit may occur where the carrier is in breach of its contract of carriage by, for example, stowing goods on deck when, under the terms of the contract, either express or implied, they should have been carried under deck.

This was the situation considered by the High Court in the case of *Nelson Pine Industries Ltd v Seatrans New Zealand Ltd*.³¹ The relevant facts of the case are that the carrier had stowed machinery on deck that, under the express terms of the contract of carriage, was quite clearly to be carried under deck. As a result of the deck stowage and the

²⁹ Article 4(5)(e).

³⁰ See *Scrutton on Charterparties and Bills of Lading*, 19th edition, 1984, 454- 456.

³¹ Unreported, High Court Wellington, CP 806/91, 13 August 1993, Ellis J.

subsequent contact of the cargo with water, the machinery was damaged. The cargo owner brought a claim and the ship's agent, who was sued in the place of the carrier under the now defunct section 11 of the Sea Carriage of Goods Act, tried to limit its liability under the Hague-Visby Rules.

Ellis J. rejected the carrier's argument that the limitation of liability should be allowed to stand. He followed the reasoning of the English High Court in *The Chanda*,³² and held that, as a matter of construction, the limitation was not intended to apply where the risk of damage to the cargo has been dramatically and wrongfully altered by the carrier. In so doing he distinguished the English Court of Appeal case, decided before the *Chanda*, of *The Antares*,³³ where it was held that wrongful stowage on deck did not prevent the carrier from relying on the time bar provisions of the Rules to defeat a claim made out of time.³⁴

When looking at *Nelson Pine* it is important to note that in that case the stowage on deck was in breach of an express term of the contract. The carrier and the shipper had expressly agreed that the machinery should be carried under deck, and the carrier clearly disregarded this for its own commercial reasons. Accordingly, it was not surprising that the Court sought to prevent the carrier relying on the limitation. In many bills of lading, however, particularly on the container liner trades, liberty is given to the carrier to stow the cargo on deck and the Rules are expressed as still applying. In this situation carriage on deck is arguably not in breach of the contract of carriage and therefore, if loss or damage occurs, the carrier may well still be in a position to rely on the unit limitation.³⁵

After finding that the carrier was not able to rely on the limitation due to the wrongful carriage on deck, Ellis J. in *Nelson Pine* went on to hold that the intentional wrongdoing provision of the Hague-Visby Rules, Article 4(5)(e), related not only to the wrongdoing of the carrier but also of the carrier's agent, the master. This is a significant extension of the scope of the intentional damage section and it remains to be seen whether, should the point surface again, whether the *Nelson Pine* would be followed. Ellis J.'s finding in this regard was obiter as he had already

³² [1989] 2 Lloyd's Rep 494.

³³ [1987] 1 Lloyd's Rep 424.

³⁴ See part 6.2 below.

³⁵ See *Svenska Traktor Aktiebolaget v Maritime Agencies (Southampton) Ltd* [1953] 2 QB 295.

found against the carrier on the limitation point and he also held that, in addition to the master, the conduct of the carrier itself was sufficiently reckless to come within the intentional damage provision.

5.3 WARSAW CONVENTION

Like the Carriage of Goods Act, the scheme of the Warsaw Convention provides for the imposition of liability for any loss or damage in exchange for the right to limit liability. The limitation provisions are contained in Article 22 of the Convention, with different limitations applying for personal injury on the one hand and for loss of or damage to cargo or baggage on the other. We do not discuss the personal injury limitation here as this seminar is directed at the carriage of goods. However, it is worth noting that despite the Accident Rehabilitation and Compensation Act 1992, there is still scope for common law personal injury claims in respect of passengers and crew of international flights and voyages.

Article 22(2) of the Convention limits the carrier's liability to 250 francs per kilogramme in respect of registered luggage or cargo, unless a declaration of special interest was made when the goods were delivered to the carrier, in which case the carrier's liability is generally limited to the declared sum. The weight used to calculate the carrier's liability is the total weight of the lost, damaged or delayed packages. However, where the loss, damage or delay affects the value of other packages covered by the same baggage check or air waybill, the total weight of these packages is also taken into consideration in determining limitation of liability. Article 22(3) limits the carrier's liability to 5,000 francs per passenger in respect of other luggage. Like Article 3(8) of the Hague-Visby Rules, Article 23 of the Convention provides that any attempt to lessen the carrier's liability is null and void.

The Convention or Poincaré gold franc referred to in Article 22 is a notional currency unit consisting of 65.5 milligrammes of gold of millesimal fineness nine hundred. The Convention provides for conversion into national currencies in round figures. This has been achieved in New Zealand by the Carriage by Air (New Zealand Currency Equivalents) Notice 1984, which specifies that the two franc amounts mentioned above are to be taken as equivalent to NZ\$33.75 and NZ\$675 respectively. It is unclear, however, whether the Notice overrides that part of Article 22(5) which provides that "conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment". What exactly constitutes the

“gold value” of a currency nowadays also throws up issues of Byzantine complexity.³⁶

Where an action is brought against the carrier’s servants or agents directly, they are entitled to limit their liability to the same extent that the carrier would be. The aggregate of damages recoverable from the carrier, its servants and its agents, may not exceed the limits of liability laid down in Article 22.³⁷

Article 25 of the Convention provides that the carrier cannot rely on the limitation of liability provisions in Article 22, or on any higher limitation amount in a special declaration of interest,³⁸ where it is proved by the plaintiff that the damage resulted from the carrier’s act or omission, “done with intent to cause damage or recklessly and with knowledge that damage would probably result”. The carrier is also not entitled to rely on the limitation of liability provisions where the plaintiff proves that the carrier’s servants or agents intentionally or recklessly caused the damage, provided that they were acting within the scope of their employment.³⁹ In the latter case, the servants or agents are also not entitled to limitation of liability, and the plaintiff may claim a total sum of damages from the carrier, its servants and its agents in excess of the limits of liability in Article 22.⁴⁰

The effect of Article 25 is well illustrated by *SS Pharmaceutical Co Ltd v Qantas Airways Ltd*.⁴¹ In this case, five cartons of pharmaceutical

³⁶ For an overview of some of the issues, current conversion practices, and possible solutions (French franc, market price, status quo, or SDR) see Shawcross & Beaumont, *Air Law*, Division VII, paras 118-122.

³⁷ Article 25A(1). Also see Articles 5 and 6 of the Guadalajara Convention in respect of the rights of the actual carrier’s servants or agents to limit their liability.

³⁸ *Antwerp United Diamond BVBA v Air Europe* [1993] 4 All ER 469, [1993] 2 Lloyd’s Rep 413.

³⁹ Article 25. The Article is unhappily drafted; it refers only to damage, rather than to the usual formula of “damage, loss, or delay”, and mentions only the scope of the servant’s employment, and not the scope of the agent’s authority. When read with Article 22, however, it is clear that “the damage” was intended to cover loss and delay as well; and it is hopefully inconceivable that a court would interpret the words of the Article restrictively. Also see Article 3 of the Guadalajara Convention in respect of the actual carrier’s servants and agents.

⁴⁰ Article 25A(2), (3).

⁴¹ [1991] 1 Lloyd’s Rep 288 (CA (NSW)), noted by McQueen [1991] LMCLQ 165.

products were consigned to Qantas for carriage from Melbourne to Tokyo. The goods were carefully wrapped in waterproof cartons, which were individually marked with a stencilled umbrella to indicate that the goods would be damaged if exposed to water. In Sydney, the cartons were stowed out in the open on the airport tarmac during a typical summer thunderstorm before being transferred to the Tokyo flight. The goods arrived damaged. At first instance, Rogers J. held that the defendant carrier's conduct was reckless, and that there was clear knowledge of the likelihood of damage to specially vulnerable cargo in the prevailing weather conditions. The plaintiffs satisfied the requirements of Article 25 and the defendants were thus not entitled to limit their liability under Article 22. A majority of the New South Wales Court of Appeal upheld this finding. The majority adopted the interpretation of the Article 25 requirements set out by the English Court of Appeal in *Goldman v Thai Airways International Ltd*:⁴²

- (a) It is sufficient if "the damage complained of is of the kind of damage known to be the probable result";⁴³
- (b) Recklessness goes beyond mere carelessness, and involves the person concerned acting "in a manner which indicates a decision to run the risk or a mental attitude of indifference to its existence"; and
- (c) The knowledge requirement involves "proof of actual knowledge in the mind" of the actor at the moment when the act/omission occurs, that the act/omission is taking place and involves probable damage of the sort contemplated in Article 25.⁴⁴

The majority held that the proved facts, the defendant's admission of "deplorably bad handling", and its failure to call evidence enabled the court to draw the necessary inferences that the case came within Article 25. The Court held that, where the evidence supported a finding of the

⁴² [1983] 3 All ER 693.

⁴³ This follows the more restrictive interpretation of Article 25 adopted in *Goldman*. It should be noted, however, that the plain words of Article 25 require only that "damage" be contemplated, not "the damage" which resulted.

⁴⁴ Whether a subjective or objective test is applied, depends on the interpretation of "recklessness" at the *lex fori*. See, e.g., *Goldman* (no warning given of severe clear air turbulence); *Newell v Canadian Pacific Airlines Ltd* (1976) 74 DLR (3d) 574 (pet dogs carried in cargo compartment with dry ice which the carrier knew would emit carbon dioxide at certain temperatures); European decisions cited in *Shawcross & Beaumont Air Law*, Division VII, para. 132.

higher standard of recklessness required under Article 25, or lesser findings of recklessness without the requisite knowledge or gross negligence, there was no difficulty in drawing the more adverse inference where the defendant failed to call evidence.

6 LIMITATION OF ACTION

6.1 CARRIAGE OF GOODS ACT

The time bar provisions of the Carriage of Goods Act are contained in sections 18 and 19 of that Act. Section 18 sets out the requirements for giving notice of a claim for damage or partial loss of the goods. The claimant contracting party must give notice of the loss or damage to the contracting carrier within 30 days and the contracting carrier then has a further 10 days to give notice of claim to any actual carrier that caused the damage. The consequence of failing to give the required notice is that the right of action is barred, unless:

- a) there has been fraud by the carrier;
- b) it is apparent from all the circumstances of the case that the carrier ought to be aware of the loss or damage;
- c) the carrier consents to an action being brought; or
- d) the Court gives leave for an action to be brought.

To obtain leave the applicant goods owner must show that failure to give notice was caused by a mistake of fact or law or any other reasonable cause. In addition, the goods owner must establish that the carrier has not been materially prejudiced by the delay.

Section 19 of the Act provides for a further time bar. This time, proceedings are barred if an action is not brought within 12 months. Time runs from different starting points depending on whether there has been a total loss of the goods or whether there has been partial loss or damage. As with the notice provisions, relief against the time bar is provided if there is fraud by the carrier, the carrier consents or the Court provides leave for the action to be brought. The criteria for leave are the same as under section 18.

An application for leave was considered in *New Zealand Railways Corporation v Child Freighters Ltd.*⁴⁵ The Court found on the facts that the owner was not materially prejudiced by the delay. However, leave to bring the action was still refused as the claimant had failed to show that the failure to bring the action was caused by a mistake of fact or law or some other reasonable cause. The Judge found that the principles to be

⁴⁵ (1985) 3 DCR 119.

applied were the same as for an application for leave to bring an action out of time under the Limitation Act 1950, with the significant exception that lack of material prejudice was an additional ground, and not an alternative ground, for leave being given. The judgment in the *Child Freighters* case is also helpful in that it sets out the relevant burdens on the applicant and the carrier in terms of supporting or opposing an application for leave.

6.2 HAGUE-VISBY RULES

For sea carriage, Article 3(6) of the Hague-Visby Rules provides a one-year time bar for all claims against the carrier for loss or damage to the goods. There are some significant differences between these provisions and sections 18 and 19 of the Carriage of Goods Act. They are:

- a) Time runs under the Rules from when the goods were delivered or should have been delivered regardless of whether there has been a partial or total loss or damage;
- b) Under the Rules liability for the loss or damage is extinguished. This is in contrast to sections 18 and 19 under which the carrier's liability continues even though the right of action is barred. Although in most cases the result is the same under either regime, the difference is significant in that under the Rules, once the time bar has taken effect, the claim cannot be resurrected.
- c) Consistent with this, is the next point of difference which is that the Rules do not contain any provisions that allow time to be extended by the Court. Given that the Rules are an international Convention, to be applied by courts in different jurisdictions, it is not surprising that there is no element of judicial discretion allowed. The uniformity of law that the Rules seek to achieve would easily be undermined if time bars under the Rules were applied differently in different jurisdictions due to inconsistent application of any discretion allowed.
- d) The notice of loss or damage provisions under the Rules go only to the burden of proof and do not themselves impose a time bar if they are not complied with.

The strict application of the Hague-Visby Rules time bar is well illustrated by the Australian case of *The "Zhi Jiang Kou"*.⁴⁶ In this case

⁴⁶ *P.S. Chellaram & Co Ltd v China Ocean Shipping Co* [1991] 1 Lloyd's Rep 493 (CA (NSW)).

the claimant first brought proceedings after the time bar had expired. It argued that up until just before the one year period expired the parties had been negotiating on the common understanding that the matter would be settled. The New South Wales Court of Appeal held that to avoid the effect of the time bar, the claimant would have to show that the carrier was estopped from pleading the time bar as a defence.

The facts of the case were that settlement negotiations were being conducted by the solicitors for the carrier and the claimant and these had not been completed when the time bar expired. During these negotiations, the carrier's solicitor had urged the claimant not to commence proceedings until settlement had been fully explored. The Court of Appeal, however, considered that the carrier's conduct was not sufficiently clear and unequivocal to amount to an estoppel. The Court also held that, even in the context of settlement negotiations, there was no obligation on the part of the carrier to advise the claimant of an impending time bar.

This case highlights the nature of the limitation of action in both the Rules and the Carriage of Goods Act. In both cases, the limitations operate to provide the carrier with a defence, which is absolute for the carriage of goods by sea.⁴⁷ If the defence is not pleaded, the claimant can proceed to judgment, including judgment by default where the carrier is served but fails to file a defence.

6.3 WARSAW CONVENTION

Article 29(1) of the Warsaw Convention provides for a two-year time bar which is calculated from the date of arrival at the destination, the date on which the aircraft should have arrived at its destination, or the date on which the carriage stopped. Like Article 3(6) of the Hague-Visby Rules, Article 29(1) of the Warsaw Convention extinguishes the claimant's right to damages, rather than merely rendering it unenforceable. It follows that, as under the Hague-Visby Rules, limitation of action provides the carrier with an absolute defence. A time-barred claim for damages also cannot be raised as a defence to an action by the carrier. In the Pythonesque words of counsel in *Proctor v*

⁴⁷ See *The Aries* [1977] 1 All ER 398, 402; *The Nordglimt* [1988] QB 183; *The Finnrose* [1994] 1 Lloyd's Rep 559.

Jetway Aviation,⁴⁸ a time-barred cause of action under the Convention is “non-existent, extinguished, finished, gone forever.”

7 JURISDICTION AND CONFLICTS ISSUES

7.1 CARRIAGE OF GOODS ACT

Choice of foreign law, foreign jurisdiction and foreign arbitration clauses

The Carriage of Goods Act is compulsorily applicable to all New Zealand domestic carriage of goods described in section 5. This would suggest that it is not open to parties to choose a foreign legal system to govern domestic carriage, and thereby escape the statutory liability scheme of the Carriage of Goods Act. However, section 8(1)(d) of the Act does allow parties to regulate the carrier’s liability themselves by means of a declared terms contract, provided that the requirements of section 8(7) are met. The parties can therefore presumably regulate the carrier’s liability themselves in a declared terms contract by specifying that it is to be determined by foreign law, as long as their choice of foreign law complies with general conflict of laws restrictions on party autonomy.

The Carriage of Goods Act does not expressly prohibit or invalidate foreign jurisdiction or arbitration clauses. Once again, therefore, the general liability scheme of the Carriage of Goods Act could presumably be avoided by including an exclusive foreign jurisdiction or foreign arbitration clause in a declared terms contract. The first type of clause may result in a stay of New Zealand proceedings brought pursuant to the Carriage of Goods Act, subject to the court’s general discretion to override the clause. The second type of clause would be more effective, in the sense that it should result in an automatic stay of New Zealand proceedings in accordance with section 4 of the Arbitration (Foreign Agreements and Awards) Act 1982.

There would seem to be little economic incentive for local carriers to include these types of clauses in their contracts for domestic carriage. They are likely to be rather more common in respect of combined transport, or carriage undertaken by foreign carriers engaging in

⁴⁸ [1982] 2 NSWLR 264, 271 (SC (NSW)); reversed on another point [1984] 1 NSWLR 166 (CA (NSW)); also see *Timeny v British Airways plc* (1991) 56 SASR 287, Shawcross & Beaumont, *Air Law*, Division VII, para 144.

domestic carriage, for example, foreign ships carrying coastal cargo under section 198 of the Maritime Transport Act 1994.

7.2 HAGUE-VISBY RULES

Choice of foreign law, foreign jurisdiction and foreign arbitration clauses

Section 209(1) of the Maritime Transport Act 1994 provides that the Hague-Visby Rules have “the force of law in New Zealand”. As noted above, Article 10 of the Hague-Visby Rules provides that the Rules apply if:

- (a) the bill of lading has been issued in a Contracting State;
- (b) the goods have been carried from a port in a Contracting State; or
- (c) the contract contained in or evidenced by the bill of lading provides that the Rules, or a statute giving effect to the Rules, are to govern.

From a New Zealand perspective, therefore, the Hague-Rules apply by force of law where the bill of lading is issued in New Zealand (Article 10(a)), where carriage is from a New Zealand port (Article 10(b)), or where the parties expressly incorporate the Rules or the Maritime Transport Act (Article 10(c)).

In *The Hollandia*,⁴⁹ the House of Lords considered the effect of the English equivalent of section 209, and held that the Rules were to be treated as if they were part of directly enacted statute law. In this case, involving carriage from Scotland, the bill of lading included a choice of law clause specifying Dutch law as the proper law of the contract, and an exclusive Dutch jurisdiction clause. Lord Diplock held that, where the Hague-Visby Rules applied by force of law, their application could not be avoided by giving foreign courts exclusive jurisdiction. In this case, the jurisdiction clause was void because it would have had the effect that Dutch law, and therefore the Hague, rather than the Hague-Visby Rules, would have applied. This would have lessened the carrier’s liability contrary to Article 3(8) of the Hague-Visby Rules. This part of the decision is of less relevance to New Zealand, as foreign jurisdiction clauses are invalidated by section 210 of the Maritime Transport Act anyway (discussed in the next paragraph). Lord

⁴⁹ [1983] 1 AC 565; discussed in *Dicey and Morris on Conflict of Laws*, 12th ed, 1993, 434-435, 1413-1415; P. Todd *Modern Bills of Lading*, 2 ed, 1990, 283-285. Also see *The Benarty* [1983] 1 Lloyd’s Rep 361; *The Alexandros P* [1986] 1 QB 464, [1986] 1 All ER 278.

Diplock's dicta concerning the foreign choice of law clause (which was held to be ambiguous and therefore ineffective in any event) are more significant. Lord Diplock was clearly of the view that, where the Hague-Visby Rules applied by force of law, a foreign choice of law clause would be ineffective where it resulted in a lessening of the carrier's liability contrary to Article 3(8) of the Rules.

As mentioned above, section 210 of the Maritime Transport Act 1994 provides that clauses which purport to preclude or limit the jurisdiction of New Zealand courts in respect of bills of lading or any other transport documents to which the Rules apply, are invalid in respect of international sea carriage to and from New Zealand. Despite this provision, exclusive foreign jurisdiction clauses are commonly found in bills of lading used in the New Zealand trade. An example would be:

The contract evidenced by this bill of lading shall be governed by English law and any dispute hereunder shall be determined in London by the High Court of Justice according to English law to the exclusion of the jurisdiction of the Court of any other country.

It is worth noting that, while this clause would be struck down by a New Zealand court as being contrary to section 210, an English court seised of a matter involving a bill of lading with this clause would uphold it,⁵⁰ as the effect of jurisdiction clauses is a matter for the *lex fori*. The New Zealand provision would therefore be regarded as irrelevant by the English court, and is unlikely even to be raised as an issue.

Section 210 does not affect the validity of foreign arbitration clauses. The status of such clauses is primarily determined by the Arbitration (Foreign Agreements and Awards) Act 1982, which implements the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Section 4(1) of the Arbitration (Foreign Agreements and Awards) Act provides that:

If any party to an arbitration agreement to which this section applies (or any person claiming through or under that person) commences any legal proceedings in any Court against any other party to that arbitration agreement (or any person claiming through or under that other party) in respect of any matter in dispute between the parties which the parties have agreed to refer to arbitration pursuant to that arbitration agreement, any party to those proceedings may at any time apply to the Court to stay those proceedings; and the Court shall, unless the arbitration agreement is null and void, inoperative, or incapable of being performed, make an order staying the proceedings.

⁵⁰

As the English Court of Appeal indeed did in *The Vikfrost* [1980] 1 Lloyd's Rep 560.

In *Air New Zealand Ltd v The ship "Contship America"*,⁵¹ Greig J. refused to stay New Zealand proceedings in a case where the goods owners invoked a foreign arbitration clause in their bill of lading. His Honour held that the clause did not meet the formal requirements laid down by the Arbitration (Foreign Agreements and Awards) Act, read with Article 2(2) of the New York Convention, because it had not been signed by both parties. With respect, it is difficult to see why Article 2(2) of the Convention, which merely defines "agreement in writing" as *including* arbitral clauses in contracts or arbitration agreements signed by the parties or contained in an exchange of letters or telegrams, should be interpreted so restrictively. In practice, this interpretation of the signature requirement would seem to limit the application of section 4(1) of the Act to bills of lading which incorporate a foreign arbitration clause from a separate agreement, for example, a charterparty, signed by both parties.⁵²

The issue of the validity of foreign arbitration clauses in cases where the Hague-Visby Rules apply by force of law was effectively left open in *The Hollandia*. Where it can be shown that the upholding of the foreign arbitration clause will result in a lessening of the carrier's liability below Hague-Visby standards (because the foreign arbitrator would apply the law of a country which had not enacted the Hague-Visby Rules), however, the clause will arguably be void by virtue of Article 3(8) of the Hague-Visby Rules. No stay of New Zealand proceedings should then be granted under section 4(1) of the Arbitration (Foreign Agreements and Awards) Act.

By contrast, in situations where the Hague-Visby Rules do *not* apply by force of law in New Zealand (for example, in respect of inward carriage where the bill of lading was issued in, and the goods were shipped from, a non-Hague-Visby jurisdiction, and where the parties have not expressly specified that the Hague-Visby Rules or the Maritime Transport Act to govern their contract), the ordinary party autonomy principle applies, which means that the parties are generally free to choose any proper law to govern their contract.⁵³ This contrast is

⁵¹ [1992] 1 NZLR 425.

⁵² See *Mobil Oil New Zealand Ltd v The ship "Stolt Sincerity"*, Unreported, High Court, Auckland, AD 628/93, 14 March 1995, where Temm J. found that the charterparty and bill of lading, read together, satisfied the signature requirement. Also *cf. Sphere Drake Insurance plc v Marine Towing Inc*, 16 F 3d 666 (5th Circ., 1994), [1994] AMC 1581, for a less restrictive interpretation of Article 2(2).

⁵³ *Apple Corp Ltd v Apple Computer Inc* [1992] FSR 431.

illustrated to some extent by the first instance decision in *The "Zhi Jiang Kou"*,⁵⁴ where Carruthers J. upheld a choice of law clause applying Chinese law, even though the goods in question had been shipped from Hong Kong, a Hague-Visby Rules jurisdiction, and the clause would result in a lower standard of carrier liability because China had not given effect to the Hague-Visby Rules. Carruthers J. distinguished *The Hollandia* on the basis that the Hague-Visby Rules had not, at that time, been given effect to in Australia,⁵⁵ and therefore did not have the force of law in Australia. The parties were therefore free to choose the proper law of their contract, subject to general conflicts principles.

7.3 WARSAW CONVENTION

Jurisdiction

Article 28(1) of the Warsaw Convention prescribes special jurisdictional rules. New Zealand courts will have jurisdiction to hear a Convention claim if:

- (a) the carrier is ordinarily resident,⁵⁶ has its principal place of business, or has an establishment by which the contract of carriage has been made, in New Zealand; or
- (b) New Zealand is the place of destination.

Where the Guadalajara Convention applies, the effect of Article 7 of that Convention is that New Zealand courts will have jurisdiction to hear a Convention claim brought in respect of carriage performed by the actual carrier:

- (a) against the contracting carrier, where the jurisdictional rules of Article 28 of the Warsaw Convention are satisfied; or
- (b) against the actual carrier, where the actual carrier is ordinarily resident or has its principal place of business in New Zealand.

⁵⁴ *P.S. Chellaram & Co Ltd v China Ocean Shipping Co* [1989] 1 Lloyd's Rep 413, 423 (SC (NSW)).

⁵⁵ The Hague-Visby Rules with SDR Protocol were given effect to in Australia by the Carriage of Goods by Sea Act 1991, some two years after the case was decided.

⁵⁶ The existence of an air carrier's branch office in a country may not be sufficient to satisfy the "ordinary residence" requirement: see *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corporation* [1980] 3 All ER 359.

Choice of foreign law, foreign jurisdiction and arbitration clauses

Section 7(1) of the Carriage by Air Act provides that the Convention has the force of law in New Zealand. Article 32 of the Warsaw Convention provides that any clause in the contract of carriage “by which the parties purport to infringe the rules laid down in this Convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction” is invalid. The effect of these two provisions is that the substantive Convention regime cannot be avoided by a foreign choice of law clause.⁵⁷ Foreign jurisdiction clauses and separate agreements entered into before the damage occurred which purport to alter the jurisdictional rules, are also null and void. Agreements to submit a Convention claim to another jurisdiction after the damage had occurred would presumably be upheld.

Arbitration clauses in the contract of carriage are, however, allowed, if the arbitration is to take place in one of the jurisdictions indicated by the Convention’s jurisdictional rules. A clause requiring arbitration in any other jurisdiction would, by implication, be void. When an arbitration clause is void for whatever reason, a stay of New Zealand proceedings under section 4(1) of the Arbitration (Foreign Agreements and Awards) Act is not available.

⁵⁷

See Shawcross & Beaumont, *Air Law*, Division VII, para 71; *Corocraft Ltd v Pan-American World Airways* [1969] QB 616, 631; *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corporation*, above n 56. *Sed contra Rustenburg Platinum Mines Ltd v South African Airways* [1979] 1 Lloyd’s Rep 19, to the effect that the construction of the Convention can be governed by the proper law of the contract incorporating the Convention; criticised by Shawcross & Beaumont as being “unacceptable on grounds of policy, as encouraging divergent interpretation of the Convention text, and ... inconsistent with the approach [of] the English courts generally”.