SHIPPING AND LOGISTICS LAW

Principles and Practice in Hong Kong

Second Edition

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Preface to the Second Edition

Strategically located on the South China Sea with a deep, sheltered harbour, Hong Kong is among the top ten largest maritime centres in the world. For many years, Hong Kong has continued to be one of the world's major logistics hubs and international cargo handling centres. It is a most significant gateway connecting Mainland China with the rest of the world.

The international competitiveness of Hong Kong will increasingly depend on its transport and logistics. By sea, road, rail, or air, we depend heavily on transport to link individuals, businesses and cities. The maintenance of Hong Kong as a free port and global logistics centre is a crucial characteristic of its economic vitality. Rapidly expanding international trade with Mainland China and Hong Kong has generated significant changes to the shipping and logistics law in both jurisdictions. Therefore, it is essential that everyone involved in international trade with Hong Kong (and Mainland China via Hong Kong) understand the backbone of the legal issues which affect every aspect of the business.

We intend to provide a general introduction to the basic principles of shipping and logistics law in Hong Kong. This book contains many practical examples and illustrations from case law. Extracts of the relevant legislation and sample shipping documents are annexed in this book for reference.

In this second edition, we have reformatted some of the materials. The book has been reoriented to concentrate on the parts of the legal framework which are most directly relevant to the logistics and maritime industry of Hong Kong. This new edition takes account of a number of new cases, new

international conventions (such as the Rotterdam Rules) and significant changes introduced by legislative amendments since the last edition.

The book is intended primarily for students and teachers of transport studies and business logistics management. However, we trust that it will also provide useful guidance to shipowners, carriers, shipping agents, traders, insurers, bankers, logistics managers, arbitrators, mediators and lawyers who need to acquire a clear understanding of the key principles in a practical context.

The division of labour associated with each of the chapters in this book is as follows: Chapters 4, 6.1, 6.2, 6.4, 11, 12, 13 (Felix Chan); Chapters 1, 6.3, 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 7.7, 7.8, 7.9, 7.10, 7.11, 10.1, 10.2, 10.3, 10.4, 10.5, 10.6, 10.7, 10.8, 10.9 (Jimmy Ng); and Chapters 2, 3, 5, 7, 8, 9 (S K Tai). The contribution of Mr Bobby Wong to the previous edition of this publication is acknowledged with gratitude.

This book has its origins in our lecture notes used in teaching. We are grateful to our students for their interest and enthusiasm. We also want to thank Hong Kong University Press for their efficient editorial work. Considering all of this help, any errors and shortcomings that remain must be ours.

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1

Introduction to the Hong Kong Shipping and Logistics Industry

1.1 BIRTH AND IMPORTANCE OF THE MARITIME CLUSTER IN HONG KONG

Hong Kong was surrounded by inhospitable and rocky terrain when British shipowners and traders arrived in the 1830s. The port of Hong Kong was used as a base for transshipment of goods traded in the East.[1] The Port of Hong Kong grew only because of the higher rate of utilization of the port by the shipping industry. The phenomenal rise of the Hong Kong shipping community was closely connected to the successful rehabilitation of Japan's economy after the Treaty of San Francisco in 1952 and the Korean War.[2]

The maritime cluster of Hong Kong was gradually established and has been widely recognized as an international maritime centre including ship management, ship owning, ship broking, ship registration, ship surveying services, maritime legal services, maritime arbitration, ship finance, marine insurance and maritime education.

The maritime industry directly contributed 1.9 per cent (equivalent to HK$30 billion or US$3.9 billion) to the GDP of Hong Kong and 1.7 per cent (equivalent to 60,800 jobs) of total employment in Hong Kong in 2010. About 700 shipping-related companies operate in Hong Kong providing a comprehensive range of maritime services. The port sector with the maritime industry accounts for 24 per cent (HK$373 billion or US$47.8 billion)

1. S Zarach, *Changing Places: The Remarkable Story of the Hong Kong Shipowners* (Hong Kong Shipowners Association 2007) 53.
2. ibid, 84.

of the GDP of Hong Kong and 23 per cent (788,000 jobs) of total employment in Hong Kong.[3]

According to the recent Consultancy Study on Enhancing Hong Kong's Position as an International Maritime Centre,[4] Hong Kong has advantages in soft power. To strengthen the institutional structure and dedicate human resources that proactively drive industrial development, the study proposed setting up a new statutory maritime body to propel the long-term development of the maritime industry in Hong Kong, including undertaking policy research, supporting manpower training, and conducting marketing and promotion regionally and internationally.[5]

1.2 LINER AND TRAMP SHIPPING

International liner shipping is a sophisticated network of regularly scheduled services of shipping that transports goods all over the world at lower cost and with greater energy efficiency than any other form of international transportation.[6] A deep sea tramp ship is prepared to carry any cargo to any port at any time, always providing that the venture is both legal and safe.[7] A common misconception in Hong Kong is that tramp shipping is not as important as liner shipping in which container cargo usually catches the attention of the general public on streets.

The United Nations Conference on Trade and Development (UNCTAD) divides all international seaborne trade in four categories, namely, crude oil and products which are in wet bulk, five major bulk (dry bulk), container (not in bulk) and other dry bulk. Wet and dry bulk cargo covers more than 75 per cent of the worldwide sea freight.[8] The majority of shipowners in Hong Kong operate or control dry or wet bulk carriers. A similar situation is observed in the shipping industry in China. Tramp shipping which is primarily involved in dry or wet bulk cargoes is equally important, if not more important, to the development of the shipping industry in Hong Kong.

3. Transport and Housing Bureau, HKSAR, *Key Messages and Questions & Answers of Hong Kong Shipping Delegation to Korea* (Transport and Housing Bureau, HKSAR 2011).
4. Transport and Housing Bureau, HKSAR, *Consultancy Study on Enhancing Hong Kong's Position as an International Maritime Centre* (Transport and Housing Bureau, HKSAR 2014).
5. Transport and Housing Bureau, HKSAR, *Press Release: Secretary of Transport and Housing Responds to 2014 Xinhua-Baltic Exchange International Shipping Centre Development Index Report*, 27 June 2014.
6. World Shipping Council <www.worldshipping.org> accessed 10 July 2014.
7. Institute of Chartered Shipbrokers, *Economics of Sea Transport and International Trade* (2010/2011 edn, Witherby Seamanship International Ltd) 85.
8. United Nations Conference on Trade and Development, *Review of Maritime Transport 2010* (UNCTAD 2010) 9.

1.3 SHIPPING INDUSTRY OF HONG KONG FACES COMPETITION

Shipowners in Hong Kong

The Hong Kong Shipowners Association (HKSOA) was incorporated in 1957 by 11 local shipowners with the purpose of creating a forum for shipowners resident in Hong Kong. Over the past 55 years, the Association has grown into one of the world's largest shipowner associations, its members owning, managing and operating a fleet with a combined carrying capacity of over 133 million deadweight tonnes. The HKSOA recognizes that an international shipping hub must provide the necessary ancillary services such as shipowners, operators and managers, ship finance banks, maritime lawyers, insurers and P&I Clubs, shipbrokers, classification societies and even journalists.[9] Hong Kong shipowners compete in the global shipping platform where competition is intense.

The Hong Kong Shipping Register

The Hong Kong Shipping Register (HKSR) has 88 million Gross Tonnage as of 23 May 2014. The Register is operated by the government of the HKSAR through the Marine Department which has over 150 years of experience in ship registration, inspection and survey. An international or local shipowner can register a ship with the HKSR subject to international standards for safety and protection of the marine environment. The benefits are that Hong Kong is one of the lowest tax regimes in the world with no profits' tax levied on overseas trade and double taxation relief arrangement with major trading partners; no nationality restrictions on manning; a clean, efficient and business friendly civil service; excellent ship management, financial, communication, legal and other support facilities; an independent, well-established common law system; and an important gateway to the mainland of China.[10]

Cargo throughput in the port of Hong Kong

The drop of 5.2 per cent (24.38 million Twenty-foot Equivalent Unit [TEU] in 2011 and 23.12 million TEU in 2012) in the container throughput in the port of Hong Kong in 2012 was unexpected under the negative impact of the

9. Hong Kong Shipowners Association, *Our History* (Hong Kong Shipowners Association 2011) <www.hksoa.org> accessed 17 July 2014.
10. Marine Department, HKSAR, *The Hong Kong Shipping Register* (Marine Department, HKSAR 2011) <www.mardep.gov.hk> accessed 17 July 2014.

global financial crisis and other factors. The port of Hong Kong was ranked as the third busiest container port in the world in container throughput in 2012.[11]

Freight forwarding

A freight forwarder is a company which specializes in providing a range of services to shippers including sea, air or land transport, consolidation, storage, inventory control, warehousing and physical distribution. Hongkong Association of Freight Forwarding and Logistics Limited (HAFFA) has several hundred members who move sea and/or sea freight in the region. HAFFA is responsible for setting industry standards and providing educational courses and business development programmes which enhance the professional levels of freight forwarders and logistics service providers in Hong Kong.[12] They usually avoid investment in assets like ships, aircraft or warehouses in order to maintain their flexibility in operation.

Maritime arbitration

Whether a place can be the maritime arbitration centre in a region largely depends on the preference and confidence of the contracting parties in the shipping business on that place. It is established through a long history of maritime arbitration activities in that place. Hong Kong Maritime Arbitration Group (HKMAG) is a division of Hong Kong International Arbitration Centre (HKIAC). Since 1985, HKIAC has processed a total of 645 maritime disputes.[13] In 2010, there are 131 appointments for the arbitrators listed in the HKMAG.[14] Those arbitrators in the list are experienced in shipping and are expert in handling maritime disputes. In recent years, Hong Kong has developed into a regional leader of maritime arbitration in the Asia-Pacific region. Singapore is another place which provides maritime arbitration in the region. From 2009, Singapore Chamber of Maritime Arbitration has handled 49 maritime cases.[15]

11. Marine Department, HKSAR, *Port of Hong Kong in Figures 2013 Edition* (Marine Department, HKSAR 2011).
12. Hongkong Association of Freight Forwarding and Logistics Limited (HAFFA) <www.haffa.com.hk> accessed 17 July 2014.
13. Source: HKIAC website and its Annual Reports.
14. The Speech of Arbitration in Hong Kong: Latest Trends and Developments made by Chiann Bao, Secretary-General of the HKIAC in British Chamber of Commerce in Hong Kong, 6 September 2011.
15. Statistics in the website of SCMA <www.scma.org.sg/pdf/casesummary.pdf> accessed 17 July 2014.

China is a major player in the international maritime business. Many international contracts that involve one party in Mainland China require arbitration outside of China. Administrative arbitration is more popular in Mainland China. In Hong Kong, both *ad hoc* arbitration and administrative arbitration are available in HKIAC.

In 2010, the Arbitration Institute of the Stockholm Chamber of Commerce surveyed the arbitration cost of major arbitration centres in the world for different levels of dispute value. The result shows that the average cost of arbitration in Hong Kong is quite competitive. The costs in the International Chamber of Commerce and Singapore International Arbitration Centre are the highest; it is followed by the Hong Kong International Arbitration Centre, Swiss Chambers of Commerce Association and Arbitration Institute of the Stockholm Chamber of Commerce. Compared with Hong Kong, the average arbitrators' fee in Singapore is higher, even with the inclusion of an administration fee in Hong Kong.[16]

16. M Luo and J Ng, 'Regional Competition for the International Shipping Center: The Development of Maritime Arbitration Center in Asia', *Journal of the Institute of Seatransport*, vol 100 (Winter 2012), 1–7.

8

Land Carriage Law (Road and Rail)

8.1 INTRODUCTION

The carriage of goods by land is the most ancient of all forms of carriage. Many goods are carried by rail, truck or lorry. As the demand for door-to-door service increases, many carriers carry on their business as couriers. In Hong Kong, it is generally the case goods produced in factories locally or in Mainland China are delivered by trucks to the Hong Kong International Airport at Chek Lap Kok or the container terminal at Kwai Chung for consignment to overseas customers by air or by sea. An effective and reliable service of domestic carriage of goods by land is essential if Hong Kong is to remain an international trade centre and logistic hub.

Liabilities of land carriers in general

Subject to any applicable legislation, the rights and obligations of a carrier are determined by the contract of carriage formed with his client. How the contract is drafted has an important bearing on the carrier's liabilities.

> *Orient Overseas Container Inc v Regal Motion Industries Ltd*[1]
>
> N formed a contract of carriage with R. Under the contract, R was required to transport some refrigerated chickens from Hong Kong to Shenzhen. The goods were packed in a container provided by P. R's driver was involved in a traffic accident which caused extensive damage to P's container. The issue was whether R might escape liability

1. [1994] 1 HKLR 282.

by referring to an exemption clause attached to the cargo receipt issued by R. The clause stated that '*[T]he owner of goods shall be responsible for the damage done to the goods during loading and unloading; the consignor shall purchase its own insurance. If during the consignment the goods are damaged due to any traffic accident, theft and burglary, fire and water flood, driver's negligence and other disaster not resistible by human beings, our company shall not be responsible and the transportation charges are still payable*'. [emphasis added]

The court held that R was liable. On its face, the clause exempted only liabilities in relation to damage to the goods. Even if it also covered damage to the container, its validity was determined by the reasonableness test laid down by the Control of Exemption Clauses Ordinance. Taking account of the short duration of the contract, the inability of other parties to have any meaningful control over the carriage, and the infeasibility of the risk of damage to the container being covered by insurance, the exemption clause was not reasonable and thus not valid against N.

When carriers are voluntarily in possession of the goods, they are also liable as bailees: see *Dense Billion Ltd v Hui Ting Sung*.[2]

Wing Hing (Tangs) Fabrics Mfg Co Ltd v Ever Reach Freight Ltd[3]

P formed a contract with E for the carriage of certain bales of cotton first from Shenzhen to Hong Kong, then from Hong Kong back to Shenzhen, and finally from Shenzhen to Sweden. E subcontracted with F for the carriage from Shenzhen to Hong Kong. The goods were lost in Shenzhen. P claimed against F, as a bailee for reward, for the loss.

The court held that F was liable. Where a bailee failed to deliver goods, the settled rule was that he had the burden of proving that it was not due to his fault. The basic duty of a bailee was to take reasonable steps to protect the goods or the bailor's title to them. In the circumstances, F should at least have notified P.

A carrier may also be liable for the loss of other parties in the law of negligence. Often, the carrier is responsible for negligent driving of carrier employees.

Lam Shui-tsin v James Tong[4]

A carrier (D) drove his lorry round a corner when P was standing on the part of the footway outside the railings which were installed to prevent pedestrians from straying on to the carriageway. Part of D's

2. [1996] 2 HKLR 107.
3. [1991] HKLY 59.
4. [1974] HKLR 357.

lorry overhung the footway and P was knocked down. P sued D for personal injuries, claiming that D was negligent.

The court held that D was liable. D was negligent in encroaching the lorry upon the footway. P, as a pedestrian, was entitled to be on any part of the footway and therefore not guilty of contributory negligence.

Generally, carriers are under a duty to take reasonable care in providing services. They should make sure, among other things, their employees are competent, vehicles are in a stage of reasonable repair and appropriate equipment is used to handle the cargo. Carriers are vicariously liable for their employees' acts done within their course of employment. They are, however, not liable for damage caused by a latent defect of the vehicle. For the defence of latent defect to succeed, the carrier must prove the nature of the defect and that a reasonable examination could not have detected the defect. It is not easy to discharge this burden of proof.[5] Similarly, a carrier is not liable for failure to use special equipment to load or unload cargo if the consignor had not informed the carrier of the equipment to be used and it was an unreasonable expectation in the circumstances to be aware of the need.

As a road user, a carrier delivering goods by road should observe the Road Users' Code and the Code of Practice for the Loading of Vehicles issued by the Director of Highways under the Road Traffic Ordinance (Cap 374). Non-compliance with the codes is prima facie evidence of negligence.[6] However, the court may not hold a pedestrian guilty of contributory negligence even though failing to comply with the Road Users' Code.

A railway should properly maintain its railway tracks and a functional system of signalling. In relation to training and supervision of employees, a railway is under a duty to see that 'all persons connected with the carrying and with the means and appliances of the carrying, with the carriages, the road, the signalling, and otherwise, shall use care and diligence, so that no accident shall happen'.[7] In the event two trains collide or a train runs off the lines, the railway is prima facie negligent. The railway may, however, prove the accident was caused by, say, a latent defect in the rolling stock or the negligence of others.[8]

Carriers must also comply with any statutory obligations imposed upon them. Whilst breach of contract and negligence carry only civil liabilities, breach of statutory duty often results in criminal prosecution. For example,

5. See *Henderson v H.E. Jenkins & Sons* [1970] AC 282; *Pearce v Round Oak Steel Works* [1969] 1 WLR 595; *Ritchie v Western Scottish M.T. Co* (1935) SLT 13.
6. Section 109(5).
7. *Wright Midland Ry* (1873) LR 8 Ex 137, 140.
8. See *Readhead v Midland Ry* (1869) LR 4 QB 379; *Latch v Rumner Ry* (1858) 27 LJ Ex 155.

if the consignor sends the goods for consignment in an unsafe container, the carrier who has the container in possession as a bailee may incur criminal liability for the use of the container under the Freight Containers (Safety) Ordinance (Cap 506). The Ordinance gives effect to the International Convention for Safe Containers 1972 and lays down statutory requirements for the safe use of containers. Under the Ordinance, a bailee who, after being served with a notice prohibiting the use of an unsafe container and continues to use it, commits an offence punishable by a fine at level 2 and to imprisonment for 3 months.[9]

In Hong Kong, a carrier may also incur criminal liability if the goods that are being carried are for the purpose of smuggling.

> *R v Wong Yin Chung*[10]
> W was a carrier and formed a contract with one customer, X, for the transport of some TV sets to a waterfront. A fishing vessel berthed at the dock when W's lorry reversed towards the water's edge. The TV sets were being loaded onto the vessel when police officers who had been waiting in ambush rushed out and arrested W and other men. It was an offence to assist with the carrying of any article (such as the smuggled TV sets in this case) the carriage of which is restricted. The law also stated that 'in circumstances that give rise to a reasonable suspicion that there is intent on the part of [a] person to evade a restriction or prohibition or to assist another person to evade a restriction or prohibition, [he] will be presumed to have such intent in the absence of evidence to the contrary'. W claimed that he had not been aware that the TV sets were being smuggled until they were put on board the vessel.
>
> The court held that the presumption applied and W was guilty of the offence.

In the *Wong Yin Chung* case, the contract is illegal as performed because it is for an illegal purpose. The carrier may sue for remuneration for service provided before being aware the cargo was to be smuggled. However, the court will not entertain any claim relating to performance done with knowledge of the illegal element.

8.2 DOMESTIC CARRIAGE OF GOODS BY LAND

Consignment note

When the goods are sent to the carrier, a consignment note is usually issued as a receipt for the goods. A consignment note is also evidence of the

9. Section 21.
10. [1993] HKLY 331.

underlying contract of carriage. Further, it may contain the terms of the contract. However, consignment notes are not documents of title. Possession of a consignment note does not equal possession of the goods covered by it.[11]

Rights of consignor and consignee under the contract

In relation to a domestic carriage of goods by land, whether the consignor or consignee is a party to the contract requires further consideration. In the uncommon event that the contract of carriage states explicitly that both the consignor and the consignee may sue under the contract, the entitlement to sue is not an issue. If the contract is silent on this point, one view is that the consignor forms the contract of carriage on behalf of the consignee if the consignor and the consignee are not the same party.[12] It follows that the consignor forms the contract of carriage as the agent of the consignee. If there is, especially at the time of the contract, evidence to show the consignor is the owner of the goods, this view is inappropriate and the consignor should be taken as a party to the contract. The consignee is, in such a case, not entitled to sue under the contract.

A consignor who is an agent of the consignee is generally not able to enforce it. On the other hand, if the consignor is a party to the contract, it may be argued the consignee is nevertheless entitled to sue under an implied contract, ie, one similar to the implied contract recognized in *Brandt v Liverpool Brazil & River Plate SN Co*[13] for carriage of goods by sea. However, the court has become increasingly reluctant to accept the existence of such an implied contract.[14] It is, therefore, not advisable for the consignee to rely solely on the implied contract.

If there is an underlying sale of goods contract between the consignor (the seller) and the consignee (the buyer), the consignee may instead sue under the sale of goods contract if unable to sue and the consignor refuses to sue for loss of or damage to the goods under the contract of carriage. This is possible only if the seller is under an obligation to deliver the goods to the buyer. The sale of goods contract determines whether it is the duty of the consignor to deliver or of the consignee to take possession of the goods.[15]

It is also possible for the sale of goods contract to provide that the seller (the consignor) is under an obligation to sue for the benefit of the buyer (the

11. *L. & S.W. Ry and G.N. Ry v Biship* (1898) 42 SJ 255.
12. *Stephenson v Hart* (1828) 4 Bing 476 and *Heugh v L.N.W. Rly* (1870) LR 5 Ex 51.
13. [1924] 1 KB 575.
14. *The Aramis* [1989] 1 Lloyd's Rep 213.
15. See section 31 of the Sale of Goods Ordinance (Cap 26).

consignee) under the contract of carriage. In refusing to do so, the seller is in breach of the sale of goods contract.

Rights to sue of consignor and consignee in the law of negligence

The rule is that a party who is the owner or in possession of the goods is entitled to sue for damage or loss.[16] If the consignee is not the owner or not in possession of the goods at the time the damage or loss occurs, the carrier cannot be sued in tort. Even if the seller is entitled to sue, full compensation of the loss may not be possible. For example, pure economic loss is generally not recoverable in the law of negligence. For example, if the loss of the cargo causes the closure of the consignee's factory, the consignee cannot sue for the loss of profit resulting from the closure.

Carriage of goods by rail

The Kowloon-Canton Railway Corporation (the KCR) is a public authority established under the Kowloon-Canton Railway Corporation Ordinance (Cap 372). The Ordinance specifies the powers and authorities of the KCR. The KCR is required to conduct its business on commercial principles. The Ordinance also declares the KCR is not a common carrier. That means the KCR has the right of refusal. Carriage of goods is part of the business of the KCR as a railway. It may provide services for the consignment of goods from Hong Kong to other regions or countries. The ordinance also authorizes the KCR, in association with carriers outside Hong Kong, to provide services of through carriage of goods. The contracts formed by the KCR and its customers determine their respective rights and obligations.

On 2 December 2007 the Rail Merger Ordinance came into effect. The Ordinance expressly empowered KCRC to grant a service concession to Mass Transit Railway Corporation Limited (MTR) and expanded the scope of the MTR's franchise to enable it to take up the operation of KCR's transport services.

8.3 INTERNATIONAL CARRIAGE OF GOODS BY LAND

Although Mainland China is the only region that a lorry or train from Hong Kong may enter, it is possible for a Hong Kong carrier to enter into a

16. *Leigh and Sillavan v Aliakmon* [1986] AC 785.

contract of international carriage of goods by land to, say, Poland. In fact, goods have been transported from Hong Kong to Russia by rail. As shown by *Wing Hing (Tangs) Fabrics Mfg Co Ltd v Ever Reach Freight Ltd,*[17] it is also possible to consign goods from Hong Kong to a European country by truck.

The two main conventions governing carriage of goods by land are the Convention on the Contract for the International Carriage of Goods by Road (CMR, the acronym in French for *Convention Relative au Contrat de Transport International de Marchandises par Route*) and the Convention concerning International Carriage by Rail (COTIF).

Since Hong Kong and the PRC are not parties to the CMR and the COTIF, international carriage of goods by land departing from or arriving at Hong Kong is, from a legal point of view, similar to domestic carriage if the governing law of the contract is the law of Hong Kong. If the contract of carriage is governed by the law of another country, for example Germany or Russia, it is possible one of the international conventions applies to part of the carriage outside Hong Kong. Further, parties doing business in Hong Kong with an international dimension may be involved in international carriage outside Hong Kong. It is, therefore, desirable for practitioners in the logistics industry to have some knowledge of the two international conventions.

It should also be mentioned that the PRC became a party to the International Agreement on Carriage of Goods by Rail (IACGR) in 1954. Other contracting states to the IACGR include Albania, Bulgaria, Hungary, Mongolia, North Korea, Poland, Rumania, Russia and Vietnam. The IACGR specifies, among other things, the rights and obligations of railway authorities, consignors and consignees in relation to international carriage of goods by rail through the contracting states. The IACGR does not apply to Hong Kong.

Convention on the contract for the international carriage of goods by road

The CMR came into force in 1961. Contracting parties to the CMR are mainly European countries including Austria, Belgium, Denmark, France, Germany, Gibraltar, Guernsey, Hungary, the Isle of Man, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, the Russian Federation, Sweden, Switzerland and the United Kingdom.

17. [1991] HKLY 59.

The CMR applies 'to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a Contracting country'. The place of taking over the goods and the place designated for delivery determine whether the CMR applies. It applies to, for example, a carriage of goods contract by truck from Hong Kong to Moscow if the governing law of the contract is Russian law. In addition, the CMR may be voluntarily incorporated into any carriage of goods by land. If it is so adopted, it forms part of the contract and thus regulates the rights and obligations of the parties.

Under the CMR, the carrier is generally liable for any loss of or damage to the goods occurring between the time of taking over by the carrier and the time of delivery. The carrier is also liable for delay in delivery. The carrier is, however, not liable if the loss or damage is caused by

- the fault of the claimant,
- inherent vice, or
- unavoidable circumstances.

The carrier is presumed to be not liable in certain specified circumstances. The specified circumstances include

- the use of open unsheeted vehicles agreed by the parties,
- defective condition of packing in the case of goods liable to wastage,
- handling or loading of the goods by the sender,
- goods particularly exposed to loss or damage through breakage or decay,
- insufficiency of marking, and
- carriage of livestock.

The presumption is rebutted if the claimant proves that the loss, damage or delay was not attributable to the specified circumstances.

Normally, the liability of the carrier is limited. For loss of or damage to goods, the amount cannot generally exceed the amount payable in the case of total loss. Subject to this, the limit of liability is 8.33 units of account per kilogramme of gross weight. For delay, the compensation cannot exceed the carriage charges. The limits may, however, be raised by agreement. Besides, the carrier is not entitled to limit his liability if the loss, damage or delay is caused by his wilful misconduct.

A claim must be brought within one year, generally from the day of delivery. Where there is wilful misconduct, the limitation period is extended to three years.

Convention concerning international carriage by rail

The COTIF joins together three conventions on carriage by rail, namely the revised Berne Rail Conventions ('the CIM' and 'the CIV') and the Additional Convention ('the CAV'). Contracting states are mainly European countries and include Austria, Belgium, Bulgaria, Croatia, Denmark, Finland, France, Germany, Greece, Iran, Iraq, Luxembourg, Norway, Poland, Slovakia, Syria, Spain, Turkey, Ukraine, the United Kingdom and Yugoslavia.

The COTIF governs only carriage taking place exclusively over railway lines registered under the Convention. For carriage wholly or partly over non-listed railways, the COTIF does not apply. The COTIF applies only to international carriage by rail, with the departing and arriving stations in two different contracting states.

For carriage of goods by rail, the CIM is relevant. For the CIM to apply, a through-consignment note covering the whole carriage must be issued. The particulars contained in a consignment note include the name of the destination station, the names and addresses of the consignee and consignor, a description of the goods, the quantity and packages of goods, and a detailed list of required customs documents. The consignor may specify the route in the consignment note. If no route is specified, the railway may choose any route which is most advantageous. The consignor may also indicate in the consignment note the amount of carriage charges that he undertakes to pay. By paying a collection fee, the consignor may ask the railway to collect a 'cash on delivery payment'. The amount to be collected must be entered into the consignment note.

The consignor is generally required to prepare a duly completed consignment note for each consignment. The consignor is responsible for the correctness of the particulars on the consignment note. Generally, a consignment note cannot cover more than one wagonload. The original is sent with the goods. A duplicate is returned to the consignor. If the railway considers it appropriate, the goods may be checked and examined to verify the particulars on the consignment note. The consignor or consignee should be invited to attend a content examination. If none of them can attend, two witnesses independent of the railway must be present, unless the local legislation states otherwise.

The railway is generally under an obligation to carry all goods that are presented as complete wagonloads. The obligation to accept is dispensed with if the carriage of the goods will cause delay or require special means of handling the railway station does not have. On the other hand, the railway must refuse to accept goods which are prohibited in any states through which they would be carried. If such goods are inadvertently accepted, the

carriage must immediately stop when the railway realizes the mistake. The matter should then be dealt with by the local police. For dangerous goods, the relevant regulations and conditions must be complied with.

The consignor is responsible for any necessary packing. The loading and unloading are governed by the relevant rules applying in the forwarding station, subject to any special agreement between the consignor and the railway contained in the consignment note. In loading the goods, the consignor is liable in the case of overloading. Delivery is effected when the railway hands over the consignment note and delivers the goods to the consignee at the destination station.

The railway is generally liable for the loss of or damage to the goods after their acceptance for carriage and before delivery. The railway is not liable if it is proved that the loss or damage was caused

- in unavoidable circumstances the consequences of which it was unable to prevent,
- by the wrongful act or neglect of the claimant,
- by his instructions,
- or by inherent vice of the goods.

Further, there are certain special risks on which the railway may rely. Examples of the special risks are

- carriage in open wagons under certain conditions,
- inadequate packing,
- defective loading by the consignor,
- completion by the consignee,
- goods inherently liable to loss or damage,
- and incorrect description of goods.

Even though the railway can prove one or more of the special risks apply, it is still liable if the claimant can show the loss was not in fact caused by the special risks. The railway's liability is generally limited. For loss of goods, the limit is 17 SDR per kilogramme of gross weight. The limits for damage are based on the loss in value of the goods. Compensation for damage cannot exceed the amount recoverable for loss of the damaged goods. If the loss or damage is caused by the transit period being exceeded, the railway is liable up to a limit of four times the carriage charges. If the goods have not been delivered within 30 days after the expiry of the transit period, the party entitled to take delivery may consider the goods lost. On receipt of compensation for the goods in such a case, the party may request the railway to notify him without delay if the goods are discovered within one year. The above-mentioned limits may be raised by a declaration

of a special interest in delivery. If the loss or damage is caused by an act of the railway, done with intent to cause such loss or damage or recklessly and with knowledge that such loss or damage will probably result, the railway is not able to invoke the limits of liability. Generally, a claim against the railway must be made within one year.

It should be noted that a protocol amending the COTIF ('the 1999 Protocol') was signed by most of the contracting states in Vilnius on 3 June 1999. The amended COTIF came into force in 2006. Some of the major changes made by the 1999 Protocol are:

- English is introduced as a working language, in addition to French and German.
- The revised CIM applies to contracts of carriage of goods by rail for reward if the place of taking over of the goods and the place designated for delivery are situated in two different Member States. Where the place of taking over and the place of delivery are within two different states, the CIM also applies if one of the states is a Member State and the parties to the contract agree to be bound by it.
- Instead of 'railway', 'carrier' is now the focus.
- The Regulations concerning the International Haulage of Private Owners' Wagons by Rail ('the RIP') is no longer in force.
- Railway vehicles may always be carried as goods.
- The consignment note contains more particulars.
- If a carriage performed by several successive carriers is governed by a single contract, all successive carriers become parties to the contract by taking over the goods with the consignment note. Each of them is responsible for the whole carriage until delivery.
- If the carrier entrusts the performance of the carriage, in whole or in part, to a substitute carrier, the original carrier is still liable for the whole carriage. For the part of the carriage performed by the substitute carrier, both carriers are jointly liable.

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