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28 October 2024

Model Law on Electronic Transferable Records (MLETR)
International Relations
Attorney General's Department
Commonwealth of Australia
National Circuit
Canberra ACT 2600

By email: MLETR@ag.gov.au

RE: Submission to Consultation to Concerning Implementation of the MLETR in Australia in Respect of Transferable Electronic Bills of Lading

I am an academic at Curtin Law School, specialising in both wet and dry shipping. I have written on historical and operational aspects of the *Carriage of Goods by Sea Act 1991 (Cth)*¹ ('COGSA') as well as on issues relating to conflicts of law and arbitration arising from contracts of carriage and sea carriage documents.² In 2021, I completed my PhD the University of Cambridge, which considered the role of stakeholders in maritime regulation.³ My submission addresses questions 12 and 17 of the Consultation paper. I consent to this submission being published on the Department's website.

¹ Simon Allison, 'Choice of Law and Forum Clauses in Shipping Documents: Revising Section 11 of the Carriage of Goods by Sea Act 1991 (Cth)' (2014) 40 *Monash University Law Review* 639.

² Simon Allison and Kanaga Dharmananda, 'Incorporating Arbitration Clauses: The Sacrifice of Consistency at the Altar of Experience' (2014) 30 *Arbitration International* 265; Simon Allison and Kanaga Dharmananda, 'Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements' (2022) 38 *Arbitration International* 151; Shane Herbst and Simon Allison, 'Breaking the Hague-Visby Rules' silence on choice of law and forum clauses: Article 3 revisited' (2024) *Lloyd's Maritime and Commercial Law Quarterly* 106.

³ Simon Allison, *The Use of Force by Non-State Actors on the High Seas: Public and Private Responses* (PhD thesis, University of Cambridge, 2021); During my studies, in 2015, I was attached as an intern to the International Maritime Organization (IMO). Prior to commencing my PhD, I completed an MPhil at the University of Western Australia, which examined the role of maritime industry stakeholders in salvage law in Simon Allison, *Salvage companies and protection of the marine environment: time to pay the piper?* (MPhil thesis, University of Western Australia, 2015).

Submission Responses

Question 12: If the MLETR was implemented, what issues (if any) do you anticipate in its application to any of the laws referenced under this section (including any laws identified by yourself in Question 11)?

The status of arbitration clauses is crucial because of the central role of the New York Convention in the enforcement of arbitral awards stemming from maritime cargo disputes.⁴ Were any MLETR implementation to bills of lading create ambiguity as to the enforceability of arbitration agreements the consequences may be widespread and catastrophic, possibility amounting to a significant impost on Australian courts. The creation of uncertainty in this area may well outweigh the certainty that MLETR may well seek to provide.

While the *Review of Section 11 of Carriage of Goods by Sea Act 1991* by the Department of Transport⁵ remains seemingly stalled, the position of arbitration agreements in bills of lading remain a source of doubt.⁶ This review must be allowed to run its course to provide clarity as to arbitration agreements in sea carriage documents covered by section 11(1)(a) and (b). A policy choice must be made in light of the *International Arbitration Act 1974 (Cth)*⁷ as to the treatment of arbitration agreements contained in, or otherwise incorporated into, electronic bill of lading upon transfer.⁸

In response to question 12 my recommendation is:

- that the Review of Section 11 of Carriage of Goods by Sea Act 1991 first be completed to provide a better picture of the liability regime in COGSA that any MLETR adoption will be interacting with.

Question 17: What comparative advantages or disadvantages can you identify in the approach to legal validity between the MLETR, and the approach enabled under the SCDAs and the COGSA?

Primary recommendation in response to question 17

In relation to the *Carriage of Goods by Sea Act 1991 (Cth)*, COGSA is a liability regime implementing a modified form of the Hague-Visby rules to contracts of carriage in sea carriage documents captured by s 10 of that Act.⁹ Presently, electronic bills of lading are appropriately accommodated by

⁴ *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

⁵ Department of Infrastructure, Transport, Regional Development, Communications and the Arts (Cth), *Review of Section 11 of Carriage of Goods by Sea Act 1991*, Discussion Paper (2022); Gregory Nell SC, 'Response of the Australian Maritime and Transport Arbitration Commission (AMTAC) to the Review into the Carriage of Goods By Sea Act 1991: potential amendments to section 11' (2022), citing Simon Allison, 'Choice of Law and Forum Clauses in Shipping Documents: Revising Section 11 of the Carriage of Goods by Sea Act 1991 (Cth)' (2014) 40 *Monash University Law Review* 639.

⁶ Simon Allison and Kanaga Dharmananda, 'Incorporating Arbitration Clauses: The Sacrifice of Consistency at the Altar of Experience' (2014) 30 *Arbitration International* 265; Simon Allison and Kanaga Dharmananda, 'Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements' (2022) 38 *Arbitration International* 151.

⁷ *International Arbitration Act 1974 (Cth)*; In particular, whether by virtue of MLETR, the transfer of an electronic bill of lading extends to the transferee becoming bound to the arbitration agreement by way of the electronic transfer. Simon Allison and Kanaga Dharmananda, 'Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements' (2022) 38 *Arbitration International* 151.

⁸ See also Prof Nicholas Gaskell, Submission in Response to a discussion paper on section 11 of the Carriage of Goods by Sea Act 1991 (2022) 1-11 [43]-[44]

⁹ Shane Herbst and Simon Allison, 'Breaking the Hague-Visby Rules' silence on choice of law and forum clauses: Article 3 revisited' (2024) *Lloyd's Maritime and Commercial Law Quarterly* 106.

art 1A of the amended Hague Rules in COGSA. Art 1A applies those rules 'with any necessary changes, to a sea carriage document in the form of a data message in the same way as they apply to such a document in printed form'.¹⁰ It is a simple matter of statutory construction and contractual interpretation to ask whether a sea carriage document is:

- (1) **issued** 'when a data message is generated in a way that constitutes issue of such a document within the system being used by the parties' (per art 1A (2)(a)); or
- (2) **transferred** 'when a data message is generated in a way that constitutes transfer of the sea carriage document within the system being used by the parties to the relevant contract of carriage' (per art 1A (2)(b)).

The supposed doubt as to whether this provision can capture electronic bills of lading in the form of electronic transferable records is arguably unwarranted. In response to question 17, my primary recommendation is:

- Art 1A of the amended Hague Rules already provide a suitable test for when those rules apply to the transfer of electronic bills of lading. Focus is directed to the system being used by the parties to the relevant contract of carriage. Where parties agree on an electronic bill of lading system, there is no need to superimpose a criteria of reliability that may diverge from the reliability that the parties to the contract of carriage have impliedly stipulated by agreement.

Alternative recommendation in response to question 17

However, proceeding on the basis that adoption of the MLETR with respect to bills of lading appears to be a foregone conclusion, I make the following observations. The following issues are those of a substantive nature that is beyond the scope of the MLETR:

1. Issuance of electronic bill of lading for the purposes of the amended Hague Rules remains a question for Art 1A(1) and (2)(a) of those rules; and
2. Questions of liability as they apply to an electronic bill of lading once validity transferred, relate to performance of obligations under those rules.¹¹

That leaves Art 1A(2)(b) governing when a sea carriage document in the form of a data message is deemed to have been transferred,¹² as being the most relevant aspect of COGSA to the provisions of the MLETR. Despite this, it is submitted that art 1A(2)(b) does not need amended as:

- if an MLETR approach to transfer is preferred then it is the Sea Carriage Documents Acts that should reflect or incorporate the MLETR approach. To ensure art 1A of the amended Hague Rules operates harmoniously with any such implementation a simple deeming provision should be added to art 1A of the amended Hague Rules, a simple deeming provision should be added to art 1A of the amended Hague Rules to the effect that a transfer of an electronic bill of lading compliant with the provisions of the Sea Carriage Documents Act is deemed to constitute a transfer for the purposes of art 1A(2) of the amended Hague Rules.

¹⁰ *Carriage of Goods by Sea Act 1991* (Cth) art 1A of the amended Hague Rules as defined by s 7, where applicable by virtue of s 10.

¹¹ See UNCITRAL's agreement as to substantive issues beyond the scope of the MLETR project including the definition of obligations of performance and the issuance of an electronic transferable record to bearer. See: *UNCITRAL Model Law on Electronic Transferable Records 2017 (MLETR) as adopted by the UNGA (A/RES/72/114) on 7 December 2017* [24].

¹² That is 'transferred when a data message is generated in a way that constitutes transfer of the sea carriage document within the system being used by the parties to the relevant contract of carriage', see *Carriage of Goods by Sea Act 1991* (Cth) art 1A(2)(b) of the amended Hague Rules as defined by s 7, where applicable by virtue of s 10.

Conclusion

In the absence of clear demand from industry stakeholders presently involved in trade¹³ (such as shippers, carriers, insurers, banks or consignees), COGSA should not be amended or otherwise modified in favour of a MLETR based approach. Trade between non-State entities of different States has an inherent transnational contractual nature. Adoption of MLETR principles with respect to bills of lading, that diverges with other trading nations, means fragmentation rather than uniformity, is likely, and has the real potential to generate costly conflict of law problems.

Low uptake of electronic bills of lading does not logically lead to the conclusion that the existing legal framework is defective. Just like a dog can be described as a “constructive cat”,¹⁴ legislative policy can define circumstances in which control of an transferable electronic bills of lading will be deemed as amounting to possession. Yet the case for “*why*” this should happen has not been established. The present legislative framework for bills of lading in Australia already sufficiently supports electronic bills of lading systems. Superimposing a layer of unnecessary complexity will not serve the purpose of simplifying Australia’s import and export regime. A lack of industry confidence in the reliability of electronic transferable systems will not be solved by merely deeming that, as a matter of law, a particular method of electronic record transfer is reliable. Industry confidence as to the reliability of electronic trade systems and the extent to which they are susceptible to fraud and other vulnerabilities is a question of fact, not law.¹⁵ It is a mistake to tell industry what they should trust. We can and should respect contractual agreement of trade participants as to what systems they deem reliable.

Yours faithfully,



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Enc:

- Simon Allison, ‘Choice of Law and Forum Clauses in Shipping Documents: Revising Section 11 of the Carriage of Goods by Sea Act 1991 (Cth)’ (2014) 40 *Monash University Law Review* 639
- Simon Allison and Kanaga Dharmananda, ‘Incorporating Arbitration Clauses: The Sacrifice of Consistency at the Altar of Experience’ (2014) 30 *Arbitration International* 265
- Shane Herbst and Simon Allison, ‘Breaking the Hague-Visby Rules’ silence on choice of law and forum clauses: Article 3 revisited’ (2024) *Lloyd’s Maritime and Commercial Law Quarterly* 106
- Simon Allison and Kanaga Dharmananda, ‘Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements’ (2022) 38 *Arbitration International* 151

¹³ I wholeheartedly endorse the arguments of Dr Feng put forward in Feng Wang, ‘Blockchain Bills of Lading and Their Future Regulation’ (Working Paper No 21/01, NUS Centre for Maritime Law, 1 April 2021) 38–39; see also Feng Wang, ‘Blockchain Bills of Lading and Their Future Regulation’ (2021) *Lloyd’s Maritime and Commercial Law Quarterly* 504.

¹⁴ [D]escribing a dog as a “constructive cat” fails to explain why a dog should be treated as if it were a cat: *Pipikos v Trayans* (2018) 265 CLR 522, [150] (Edelman J). Cf, as to ‘what amounts to possession in the digital sphere’: UK Law Commission, *Digital Assets: Electronic Trade Documents*, Consultation Paper 254 (2021) [5.135].

¹⁵ As well as the extent to which errors may be lawfully corrected, see Feng Wang, ‘Blockchain Bills of Lading and Their Future Regulation’ (Working Paper No 21/01, NUS Centre for Maritime Law, 1 April 2021) 17.