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Significant amendments to Carriage of Goods by Sea Act

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Introduction

In July 2021 the Carriage of Goods by Sea (Amendment) Act (2020) (the "Amendment Act") and its supplementary Carriage of Goods by Sea (Amendment of First Schedule) Order 2021 (the "Order") officially came into force.

The Amendment Act and the Order brought into effect the long-awaited changes to the Carriage of Goods by Sea Act 1950 (the "Principal Act"), which has been in force since 23 May 1950.

Reasoning

Prior to the amendments coming into force, the Principal Act regulated the carriage of goods by sea in Peninsular Malaysia by adopting the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, which was incorporated as the First Schedule in the Principal Act.

The main reason for amending the Principal Act is to implement:

- the "Visby Rules" – the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 23 February 1968; and
- the "The Hague-Visby Rules" – the Protocol (SDR Protocol) Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924 (The Hague Rules), as amended by the Protocol of 23 February 1968 (Visby Rules).

The Amendment Act consists of four sections. This article focuses on the following changes:

- The scope of documents relating to shipping transactions, which was limited to bills of lading, has been expanded to keep up with the rapid evolution of international maritime industry practices.
- The First Schedule of the Principal Act has been amended in accordance with the The Hague-Visby Rules.

Amendments

Expanded scope of documents

Prior to the amendments, the Principal Act applied to bills of lading. This can be seen in section 4 of the Principal Act, which states as follows:

4. Statement as to application of Rules to be included in bills of lading

Every bill of lading, or similar document of title, issued in Malaysia which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the said Rules as applied by this Act.

However, in section 2 of the Amendment Act, the words "bills of lading" have been replaced with the words "sea carriage document(s)".

Similar changes have also been introduced to section 6 of the Principal Act. The original section 6 was restrictive and encapsulated only the weight of any bulk cargo inserted in the bill of lading. The original section 6 stated as follows:

Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of the shipment shall not be deemed to have been guaranteed by the shipper.

Subsequent to the alterations to section 3 of the Amendment Act, all references to "bill of lading" in section 6 have been updated to "sea carriage document".

Therefore, the amendments allow the Principal Act to recognise broader types of sea carriage documents commonly used by seafarers when conducting maritime trade. This effectively widens the substantive legal protection afforded to seafarers and maritime traders, thereby boosting international maritime traders' confidence to do business in Malaysia.

The Hague-Visby Rules

Section 4 of the Amendment Act introduces a new section 6A to the Principal Act, which empowers the minister of transport to amend the First Schedule to the Principal Act by way of an order published in the *Gazette*.

Section 6A of the Principal Act came into force on 15 July 2021. Pursuant to the power under section 6A of the Principal Act, the minister of transport amended the existing First Schedule in the Principal Act, which was based on the The Hague Rules.

In general, the amendments have facilitated a universal substitution of references to "bill of lading" to "sea carriage document".

Amendments to article I – definitions

A new paragraph (aa) has been added to article I.

The addition has amended the Principal Act, providing a clearer definition of a "consignment note". Under paragraph (aa), a consignment note means a non-negotiable document that:

- I. contains or evidences a contract of carriage by sea in connection with which no bill of lading or similar document of title has been issued;*
- II. clearly states that no liability for any loss of, damage to or delay of the goods will be accepted by the carrier of the goods; and*
- III. is clearly marked as being non-negotiable.*

Paragraph (b) of the original article I was replaced with a new paragraph that defines a contract of carriage as that it:

applies only to contracts of carriage covered by a sea carriage document, in so far as such document relates to the carriage of goods by sea, including a negotiable sea carriage document issued under or pursuant to a charter-party from the moment at which the document regulates the relations between its holder and the carrier concerned.

To add clarity to the amended Principal Act, a new paragraph (ba) has also been inserted to provide a definition of "data message". Under the new paragraph:

"data message" means information generated, stored or communicated by electronic, optical or analogous means, including electronic data interchange, electronic mail, telegram, telex or telecopy, even if the information is never reproduced in printed form.

In conjunction with the expansion of the scope of documents recognised and governed under the amended Principal Act, new paragraphs – (f) and (g) – are now in service to provide definitions for "negotiable sea carriage document" and "sea carriage document". Under paragraphs (f) and (g), these terms are now defined as follows:

(f) "negotiable sea carriage document" means-

(i) a bill of lading other than a bill of lading that, by law, is not negotiable; or

(ii) a negotiable document of title that is similar to a negotiable bill of lading and that contains or evidences a contract of carriage of goods by sea;

(g) "sea carriage document" means-

(i) a bill of lading;

(ii) a negotiable document of title that is similar to a bill of lading and that contains or evidences a contract of carriage of goods by sea;

(iii) a bill of lading that, by law, is not negotiable; or

(iv) a non-negotiable document including a consignment note and a document of the kind known as a sea waybill or the kind known as a ship's delivery order which either contains or evidences a contract of carriage of goods by sea . . .

New article IA – sea carriage documents

By virtue of the Order, further and more comprehensive details have been given under the new article IA on the applicability of sea carriage documents.

The new article begins by affording equal legal protection to a digital sea carriage document as that of a printed sea carriage document. Reading this amendment together with the newly added paragraph (ba) under article I, it means that a sea carriage document does not need to be printed to be afforded legal protection under the amended Principal Act. Sea carriage documents presented in soft copies also enjoy legal protection.

Paragraph 2 of the new article IA provides for the time and manner in which a sea carriage document should be issued and transferred. Paragraph 2 provides that:

a. a sea carriage document is 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 to the relevant contract of carriage; and

b. a sea carriage document 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.

Amendments to article II – risks

The amendment also introduced additions to article II. In particular, the following paragraphs have been added to afford greater protection to carriers for goods carried on or above deck:

2. For the purpose of paragraph 1, "goods includes goods, except live animals, carried on or above deck".

3. Where the shipper has specific stowage requirements for goods carried on or above deck, then, for paragraph 1 to apply, the shipper shall tell the carrier in writing of those requirements at or before the time of booking the cargo.

4. Notwithstanding Article IVbis, if a carrier carries goods on or above deck contrary to an express agreement with the shipper of the goods made at or before the time of booking the cargo, then, for any loss or damage to the goods that results solely from the goods being carried on or above deck, the carrier is not entitled-

(a) to any exception or exemption under these Rules; or

(b) to any limit provided by these Rules to its liability for the loss or damage.

Amendments to article III – responsibilities and liabilities

The Order has not changed the substance of article III but it has amended the original article 4 to afford a negotiable sea carriage document (which has substituted the bill of lading) greater evidential value in the event of a dispute.

Under the original provision, it was declared that a bill of lading was prima facie evidence of the receipt of the goods by the carrier, as described in accordance with:

- paragraph 3(a) (marks necessary for the identification of the goods);
- paragraph 3(b) (number of packages, price or the quantity or weight of the goods); and
- paragraph 3(c) (apparent order and condition of the goods).

However, the Order has introduced amendments that have increased the evidential value of a negotiable sea carriage document. Now, not only is a negotiable sea carriage document prima facie evidence of receipt of the goods by the carrier, but also any proof to the contrary is inadmissible if a negotiable sea carriage document has been transferred to a third party acting in good faith.

The wording of paragraph 6 of the Principal Act has been amended. The former wording was as follows:

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

The new wording is as follows:

Subject to paragraph 6bis, the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

Further, a new paragraph, 6bis, has been inserted to allow for an action for indemnity against a third party. Paragraph 6bis reads as follows:

6bis. An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

Amendments to article IV – rights and immunities

Prior to the amendments, paragraph 5 of article IV limited the liability of a shipper or carrier to any loss or damage of goods shipped, unless the value of the goods had been declared.

The Order overhauled this approach and inserted a more commercially practical approach by calculating the amount for which the shipper or carrier will be liable if the goods have been damaged or lost and the value was not declared in the sea carriage document.

The Order has removed the cap of £100 per package or unit for damages. The new system calculates damages using:

- the unit of account per package or unit; or
- the unit of account per kilogram of gross weight of the goods that have been lost or damaged.

The higher value of the two options is used for the calculation. The total amount recoverable is calculated by referring to the value of the goods at the place and time that the goods were discharged, or should have been discharged, from the ship.

Article IVbis – defence and limit of liability

Article IVbis has been inserted as a specific provision under the First Schedule of the amended Principal Act, to govern the defences and limit the liability afforded to a carrier in a sea contract.

This article provides that the defences and limits of liability provided in the amended Principal Act, as a whole, will be applicable to "a servant or agent of the carrier", notwithstanding any potential actions resulting from the contract or in tort. However, article IVbis expressly prohibits the carrier or its servant and/or agent from relying on the defences or limits of liability stipulated under the amended Principal Act "if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result".

Amendments to article VI – special condition

Article VI, as amended, still provides that notwithstanding the preceding articles, a carrier, master or agent of the carrier, and a shipper will be at liberty to enter into any agreement in any terms for the responsibility and liability of the carrier for any particular goods. This is also the case as regards the rights and immunities of the carrier in respect of such goods, or their obligation to achieve seaworthiness, "so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents" in regard to the following actions conducted for carrying goods by sea:

- loading;
- handling;
- storage;
- carriage;
- custody;
- care; and
- discharge.

The amendments to article VI introduced the following additional requirements:

- a. the terms so agreed must be set out in a receipt or consignment note; and*
- b. the receipt or consignment note must be, and must be marked as being, non-negotiable; and*
- c. the receipt or note must state that no other sea carriage document has been, or will be, issued for the carriage.*

Article VI, as amended, stipulates that any agreement entered into will have full legal effect. However, article VI does not apply to ordinary commercial shipments made in the ordinary course of trade; it applies only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such that would reasonably justify a special agreement.

Amendment to article IX

The amendment to article IX removed much of the original content. The original paragraph provided that "the monetary units mentioned in these Rules are to be taken to be gold value". However, it has been replaced with a paragraph that reads as follows:

These Rules shall not affect the provisions of any international Convention or national law governing liability for nuclear damage.

Comment

The Carriage of Goods by Sea Amendment Bill was introduced in Parliament in 2019 to amend the Carriage of Goods by Sea Act 1950, which contained procedures that were no longer in line with global practice in the maritime trade industry. The provisions of the The Hague Rules, as provided for in the First Schedule to the Carriage of Goods by Sea Act 1950, were inadequate to meet the current conditions and practices of carrying goods by sea.

The amendments to the Principal Act have occasioned changes that have been welcomed by stakeholders in the maritime trading industry.

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