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Lading Without Bills – How Good is the Bolero Bill of Lading in Australia?

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Lading Without Bills – How Good is the Bolero Bill of Lading in Australia?

Abstract
BOLERO (Bills of Lading Electronic Registry Organisation) is a pilot project funded partially by the European Union in 1994. 'Bolero.net' is the legal structure for paperless international trade launched in September 1999. It is operated by Bolero International Limited, which is a joint venture between SWIFT (Society for Worldwide Interbank Financial Transactions) and TT Club (Through Transport Mutual Insurance Association Limited). It provides services to Bolero Association Limited, which is a non-profit-making association owned by Bolero users.

So how good is the Bolero Bill of Lading (BBL) in Australia? Can it achieve 'electronic negotiability'? This paper will examine whether Bolero Rulebook (ie a multi-lateral contract between Bolero users) is compatible with the relevant international law and Australian law.

Keywords
BOLERO, Bills of Lading Electronic Registry Organisation, lading, bills of lading

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LADING WITHOUT BILLS – HOW GOOD IS THE BOLERO BILL OF LADING IN AUSTRALIA?

By Winnie (Jo-Mei) Ma[*]

BOLERO (Bills of Lading Electronic Registry Organisation) is a pilot project funded partially by the European Union in 1994. 'Bolero.net' is the legal structure for paperless international trade launched in September 1999. It is operated by Bolero International Limited, which is a joint venture between SWIFT (Society for Worldwide Interbank Financial Transactions) and TT Club (Through Transport Mutual Insurance Association Limited). It provides services to Bolero Association Limited, which is a non-profit-making association owned by Bolero users.[1]

So how good is the Bolero Bill of Lading (*BBL*) in Australia? Can it achieve 'electronic negotiability'? This paper will examine whether Bolero Rulebook[2] (ie a multi-lateral contract between Bolero users) is compatible with the relevant international law and Australian law.

Bolero's Challenge to Negotiability

Beginning as a receipt for goods containing the contract of carriage, a bill of lading (*BL*) has acquired the status of 'negotiable document of title' by mercantile custom.[3] This function enables the holder of a BL to obtain delivery, sell goods during transit, and use BL as security to facilitate payment.[4] A BL is

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1 See J Clift, 'Electronic Commerce: the UNCITRAL Model Law & Electronic Equivalents to Traditional Bills of Lading' (1999) 27 *International Business Lawyer* 311 at 316; R Caplehorn, bolero.net – the global electronic commerce solution (1999) *Journal of International Banking & Financial Law* [web document] Available: <http://www.bolero.net> [12 October 2000]; S Taylor, *The Bills of Lading Electronic Registry Organisation: The Bolero Project* [Web document version] Available: <http://www.elbornes.com>.

2 Bolero Rulebook (1st ed, September 1999) Available: <http://www.bolero.net> (*Bolero Rulebook*).

3 *Lickbarrow v Mason* (1787) 100 ER 35; 2 TR 64.

4 D Faber, 'Electronic Bills of Lading' (1997) *Lloyd's Maritime & Commercial Law Quarterly* 232 at 238.

transferable by delivery or endorsement.[5] Many regard this function as the most difficult to replicate electronically,[6] since most legal regimes require 'tangible original paper document, susceptible to immediate visual verification on the spot'.[7]

However, Bolero took the challenge by offering a functionally equivalent of BL through the Title Registry (ie a central registry which records users' rights and obligations in relation to BBL),[8] as well as the Core Messaging Platform and User Database (which identify users and authenticate all electronic messages exchanged within a closed system).[9]

Nature of BL – 'Transferability' vs 'Negotiability'

Owing to the common usage, this paper will use the words *transferable* and *negotiable* interchangeably. While a BL is a 'negotiable document of title', it is nevertheless not a 'negotiable instrument'. Unlike a bill of exchange, a BL is not a document which *gives* title to the goods, but it is a document which *represents* title to the goods.[10] Accordingly, an endorsee of BL may not obtain a better title than the original holder of BL.[11] Depending on the contracts of sale and/or

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5 *Kum v Wah Tat Bank* [1971] 1 Lloyd's Rep 439; definition of 'BL' in Sea-carriage of Documents Act 1996 (Qld) s 3 and Hamburg Rules Art 1.7.

6 D Faber, 'The Use of EDI in International Trade: Implications for Traders, Bankers, Carriers and Insurers' (30-31 May 1995) 10th BILETA Conference, University of Strathclyde [Web document version] [23 October 2000]; A Nilson (1999) *Development of International Law Inside Closed Groups* [Web document version] Available: <http://www.ilpf.org/confer/present99/nilsonpr.htm> [6 November 2000]; E Greiner (1997) *EDI & the Traditional Bill of Lading* [Web document version] Available: <http://www.uctshiplaw.com/theses/greiner1.htm> [6 November 2000] at 4.

7 A N Yiannopoulus, *Ocean Bill of Lading: Traditional Forms, Substitutes & EDI Systems* (1995) 37; J Clift, above n 1 at 311.

8 See r 1.1(53) of Bolero Rulebook; International Legal Feasibility Report (prepared by Allen & Overy & Richards Butler) (2nd ed, 1999) at 23-24; Available: <http://www.bolero.net> (*Feasibility Study*).

9 See Appendix to Bolero Rulebook – Operating Procedures at 6 (1st ed, September 1999) Available: <http://www.bolero.net> (*Operating Procedures*) at 6-8.

10 *Kum v Wah Tat Bank* [1971] 1 Lloyd's Rep 436 at 444 per Lord Devlin.
See also M Pryles, J Waincymer and M Davies, *International Trade Law* (1996) 217-218; E Muthow (1997) *The Impact of EDI on Bills of Lading – A Global Perspective on the Dynamics Involved* [Web document version] Available: <http://www.uct.ac.za/depts/shiplaw/muthow2.htm> [23 October 2000] at 14; M Bridge, *The International Sale of Goods* (1999) 421.

11 *The Future Express* [1993] 2 Lloyd's Rep 542 at 547 per Lloyd LJ.

carriage, transfer of BL effects transfer of *possession* of the goods, but not necessarily *ownership* of the goods.[12]

Nature & Functions of BBL

BBL is the 'BBL Text' (ie document digitally signed by the carrier with content similar to paper BL) plus 'Title Registry Record' (ie entries made by the Title Registry concerning BBL in accordance with users' electronic instructions).[13] Users can transfer BBL by sending 'Title Registry Instructions' for 'Role Designations'.[14]

Despite the different procedures, the table below shows that BBL can, through a series of electronic messages, replicate the functions of delivering and endorsing BL.[15]

Conventional approach[16]	**Bolero approach**[17]
Transfer by delivery (physical possession)	Designate 'Holder'[18]
Transfer by endorsement: • Blank endorse (to bearer) • Endorse to specified endorsee	 Designate 'Bearer Holder' Designate 'To Order Party' or 'Holder-to-Order'

12 *Sauders v Maclean* (1883) 11 QBD 327 at 341 per Bowen LJ.
13 Bolero Rulebook r 1.1(11)(6)(55).
14 Operating Procedures at 39, 52. The rights and obligations of Bolero users in relation to a BBL are grouped into 'roles' that reflect both the traditional functions of a BL and the way those functions have been replicated by the operation of the Title Registry, which keeps a record of those roles as data fields within a Title Registery Record. Bolero Rulebook r 1.1(55) defines 'Title Registry Instruction' as the portion of an electronic message sent through the Bolero system which directs the Title Registry to enter or change certain specified information in the Title Registry Record for a specified BBL.
15 Delivering or endorsing BL has the effect of renouncing rights attached to BL under carriage contract and transferring such rights to the transferee: J Clift, above n 1 at 314.
16 See the explanation of these methods in R Burnett, *Law of International Business Transactions* (1999) 86.
17 Bolero Rulebook r 3.3(2) enables the carrier to create a transferable BBL by designating a To Order Party or by making a blank endorsement of the bill. See Operating Procedures at 39, 44-45.
18 'Holder to order' is both 'Holder' and 'To Order Party': Bolero Rulebook r 1.1(32).

These role designations transfer the rights in goods by *attornment* and the contract of carriage by *novation.* The former operates on the basis of a carrier's acknowledgment that it holds goods to a transferee's order.[19] The latter is the process whereby a contract between two parties is extinguished and an identical contract is created between one of the parties and a third party.[20]

Are there any legal obstacles to the Bolero approach?

19 See *Griffin v Weatherby* (1868) LR 3 QB 753; P H Clarke, *Principles of Commercial Law* (1997) 203.

20 See J Bailey, 'Novation' (1999) 14 *Journal of Contract Law* 189.

Legal Feasibility Study & Bolero Rulebook

After surveying 18 jurisdictions worldwide (excluding Australia), the *Legal Feasibility Study* concludes that as at December 1999, there already is a legal platform for Bolero.[21] However, since some legal systems will ascribe the character of 'negotiable document of title' only to original paper documents, *Bolero Rulebook*, as a multi-lateral contract between users, is needed to give legal efficacy to BBL.[22]

Accordingly, this paper will examine how certain provisions in the Rulebook fit into the current legal framework, in particular:

- International law – the Hague-Visby Rules, the Hamburg Rules, and UNCITRAL Model Law on Electronic Commerce 1996 (*Model Law*); and

- Australian law – Carriage of Goods by Sea Act 1991 (Cth) (*COGSA*) and Sea-Carriage Documents Act 1996 (Qld) (*SCOGA*).

The emphasis on Australian law stems from the fact that Australia was not part of the Legal Feasibility Study, and yet it is the leader in recognising electronic BL.[23]

Relevant Regulatory Regime

Two international conventions currently govern bills of lading and carriage of goods by sea.

Hague-Visby Rules & COGSA

The Brussels International Convention for the Unification of Certain Rules Relating to Bills of Lading (1924) (*Hague Rules*) came into force in 1931. It has

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21 Feasibility Study at 15. The 18 jurisdictions surveyed are: USA (New York State and Federal law), Belgium, England, France, Germany, Ireland, Netherlands, Abu Dhabi, China, Hong Kong, Indonesia, Japan, Malaysia, Philippines, Singapore, Republic of Korea, Taiwan and Thailand.

22 Richard Butler (2000) *Bolero Brings Paperless International Trade Closer* [Web document version] Available: <http://www.richardsbutler.com/news_events/hot_topics/list/paperless.htm> [14 October 2000]; Feasibility Study at 42.

23 See E T Laryea, 'Bolero Electronic Trade System – An Australian Perspective' (2000) 16(1) Journal of International Banking Law 4-11; ET Laryea, 'Paperless Shipping Documents: An Australian Perspective' (2000) 25(1) *Tulane Maritime Law Journal* 255-298.

been amended by two Protocols – the Brussels Protocol Amending the Hague Rules Relating to Bills of Lading in 1968, and the Special Drawing Rights Protocol in 1979. This amended version is commonly known as the '*Hague-Visby Rules*' and has been adopted in Australia through COGSA.[24]

Schedule 1 of COGSA reproduces Articles 1 to 10 of the Hague-Visby Rules. To complicate the matter, Schedule 1A incorporates various changes to these articles. Consequently, Schedule 1A is commonly known as the 'modified', 'amended' or the 'Australian version' of the Hague-Visby Rules (*Australian Hague-Visby Rules*).

Hamburg Rules & COGSA

The United Nations Convention on the Carriage of Goods by the Sea 1978 (*the Hamburg Rules*) came into force in 1992. Australia is yet to ratify these Rules, although Schedule 2 of COGSA (which is yet to commence in operation) reproduces Articles 1 to 26. The legislative intention is to replace the Hague-Visby Rules with the Hamburg Rules, although the latter may be repealed in October 2001 if such a replacement does not occur.[25]

In light of the Australian version of the Hague-Visby Rules (which incorporates part of the Hamburg Rules), the Hamburg Rules may never come into force in Australia.

Model Law

The United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Electronic Commerce at its 29th session in 1996 (*Model Law*). Part 2 Chapter 1 of the Model Law (ie Articles 16 and 17) specifically concerns carriage of goods.

The Model Law is not self-executing and must be enacted into domestic law.[26] Australia has done so by enacting a series of legislation including COGSA and SCOGA.

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24 However, the 'Hague-Visby Rules' are actually referred to as the 'amended Hague Rules' in COGSA.

25 COGSA ss 2(3), 2A.

26 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 [Web document version] Available: <http://www.uncitral.org> [17 October 2000] (*Guide to Enactment of Model Law*).

SCOGA

This Queensland Act repeals and replaces sections 5 to 7 of Mercantile Act 1867 (Qld). All Australian jurisdictions (except for the landlocked ACT) have passed similar legislation after recent reforms to the old bills of lading legislation. The SCOGA in each jurisdiction derives from the Commonwealth Bill, which is based on the Carriage of Goods by Sea Act 1992 (UK).[27]

Critique of Bolero Rulebook

Contractual Nature

The Rulebook only binds users,[28] without affecting third parties who may nevertheless be part of the transaction. The system will fail if this multi-lateral agreement is not watertight.[29] Despite its jurisdiction and choice of law clauses, the Rulebook is subject to mandatory laws such as the Hague-Visby Rules and the Hamburg Rules, as well as other relevant domestic laws.

Applicability of Mandatory Laws

Both the Hague-Visby Rules and the Hamburg Rules prohibit contracting out.[30]

Will the Hague-Visby Rules apply to BBL? The Rules apply only to 'contracts of carriage covered by a BL or *any similar document of title*'.[31] It is doubtful whether a series of electronic messages can fall within this definition.[32]

By contrast, the Australian Hague-Visby Rules extend to contracts of carriage covered by a 'sea carriage document' (which includes BL and negotiable document of title that is similar to a BL) 'in the form of a data message'.[33] '*Data message*' is defined as information generated, stored or communicated by electronic means, even if the information is never reproduced in printed form.[34]

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27 M Davies, 'Australian maritime law decisions 1998' (1999) *Lloyd's Maritime & Commercial Law Quarterly* at 408; Explanatory Notes on SCOGA (Qld).
28 Bolero Rulebook r 2.1(1); Feasibility Study at 25; Operating Procedures at 6.
29 S Taylor, above n 1 at 6.
30 Hague-Visby Rules Art 3.8; Hamburg Rules Art 23.
31 Art 1(b) of Hague-Visby Rules.
32 E T Laryea, 'Bolero (Electronic) Trade System – An Australian Perspective', above n 23.
33 Australian Hague-Visby Rules Art 1.1(b), 1A.1.
34 Ibid Art 1.1(ba). See Art. 1(a) of Model Law and s 3 of SCOGA for similar definitions of 'data message'.

In any event, the Rulebook expressly provides that BBL 'shall be subject to any international convention, or national law giving effect to such international convention, *which would have been compulsorily applicable if a paper BL in the same terms had been issued*'.[35] It also provides that international conventions or the implementing of national laws will prevail if they conflict with the BBL provisions.[36]

This is consistent with Art 17(6) of Model Law, which states that the compulsory application of certain laws to carriage contracts shall not be excluded by the fact that data messages are used instead of paper documents.[37]

Choice of Law

Subject to mandatory laws at international level, English law is the chosen law for the Rulebook.[38] Since the Rulebook merely seeks to secure legal validity of electronic transactions without governing the underlying contracts or transactions,[39] it does not preclude dual systems of law. For instance, English law may govern novation of carriage contract under the Rulebook, while the carriage contract (which is novated) may be subject to another legal system.[40]

Will Australian courts recognise such a choice? According to s 11 of COGSA:

- All parties to a sea carriage document relating to carriage of goods from any place in Australia to any place outside Australia are taken to have intended to contract according to the laws of the place of shipment (s 11(1)); and

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35 Bolero Rulebook r 3.2(4).
36 Ibid.
37 Guide to Enactment of Model Law at 39.
38 Bolero Rulebook r 2.5(2).
39 This is implied in r 3.8(8) of the Rulebook: 'Nothing in this Rulebook shall be construed as permitting any user to designate any person in breach of the user's obligations or duties arising under or in relation to any underlying contract governing the transaction.'
The Rulebook 'stands above the contract' and leaves the parties to agree on the terms contract via the Bolero system: Richards Butler, above n 22; A Nilson, above n 5 at 5; R Caplehorn, 'Bolero.Net – The Global Electronic Commerce Solution For International Trade' (1999) *Butterworths Journal of International Banking & Financial Law* 421 at 422-423.
40 Feasibility Study at 72, 112.

- An agreement (whether made in Australia or elsewhere) has no effect so far as it purports to preclude or limit the effect of s 11(1) in respect of a BL (s 11(2)(a)).

Section 11 is in that part of COGSA concerning the application of the Hague-Visby Rules. Section 16 is in that part concerning the application of the Hamburg Rules, which also deems parties to outward carriage (from Australia) to contract according to COGSA.

It follows that a BBL concerning outward carriage (from Australia) would be subject to the laws of the place of shipment (which may not be English law). In light of the Rulebook's duality feature and scope, the choice of English law would have no effect in Australia to the extent that it overlaps with Australian law relating to electronic BL. Electronic transferability of BL and data security are some examples. Thus it is important to ensure that the Rulebook provisions governing the status and transfer of BBL are consistent with COGSA and SCOGA.

On the other hand, if the place of shipment is in a country which does not recognise electronic transactions and/or party autonomy in choice of law, then BBL would be unenforceable in that country.

Choice of Courts

Pursuant to the Rulebook, English courts have exclusive jurisdiction over all claims for non-compliance with the Rulebook, but have only non-exclusive jurisdiction over other disputes arising out of the Rulebook.[41]

This appears to conflict with Article 21 of the Hamburg Rules, which entitles parties to institute 'judicial proceedings relating to carriage of goods under [the Hamburg Rules]' in certain places, including the place of contract, port of loading and port of discharge. However, if the Hamburg Rules have no specific requirements that overlap with or affect the Rulebook, then non-compliance with the Rulebook may not give rise to any claims under the Hamburg Rules.

The jurisdiction clause in the Rulebook would also have no effect under s 11(2) of COGSA, to the extent that it purports to preclude or limit the jurisdiction of an Australian court in respect of a sea-carriage document relating to both the

41 Bolero Rulebook r 2.5(3)(4).

inward and outward carriage of goods.[42] Accordingly, Australian courts would disregard the Rulebook's choice in these circumstances, at least in relation to the application of the Hague-Visby Rules under COGSA.[43]

Issuance of BL

Issuing a BL evidences the carrier's receipt of goods and the promise made to the shipper under the carriage contract to carry and deliver the goods to the consignee, or the last endorsee, or the bearer of the BL.[44]

A carrier can create a BBL by transmitting a message (which includes BBL Text) to the Title Registry.[45] Users undertake not to challenge the validity of digitally signed messages, as these messages are taken to satisfy the *writing* and *signature* requirements under 'any applicable requirement of law, contract, custom or practice'.[46]

Incoterms 2000[47] also recognise the validity of electronic messages.[48] The A8 and B8 clauses allow the replacement of a negotiable BL by an equivalent EDI[49] message, '*where the parties have agreed to communicate electronically*'.

This raises the question of whether such an agreement would be contrary to any mandatory laws. While there is no law governing the procedure for the issue of BL, certain laws may require BL to be in writing.[50]

The Hague-Visby Rules & the Hamburg Rules

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42 COGSA s 11(2)(b)(c). Note the mandatory choice of law is limited to outward carriage, unless the parties agree that the Hague-Visby Rules would govern their inward carriage: s11(1)(2)(a).

43 Query whether one can reconcile s 11 of COGSA with Art. 21 of Hamburg Rules. This may not be necessary given that Hamburg Rules may never come into force in Australia as they are likely to be repealed in October 2001: s2(3) of COGSA.

44 J Clift, above n 1 at 314.

45 Bolero Rulebook r 3.1.

46 Bolero Rulebook r 2.2.2.

47 Incoterms 2000 were adopted by the ICC (International Chamber of Commerce) and came into force on 1 January 2000. It provides a set of international rules for interpreting the most commonly used trade terms in foreign trade. Before they become binding, parties must contractually agree to adhere to them and expressly refer to them in the contract of sale.

48 J Mo, *International Commercial Law* (2nd ed, 2000) 235; D Faber, above n 5 at 3.

49 EDI stands for 'Electronic Data Interchange'.

50 J Mo, above n 48 at 225.

Both the Hague-Visby Rules (Art 3.3) and the Hamburg Rules (Art 14.1) require the carrier to '*issue*' BL '*on demand of the shipper*'. Is this a requirement to physically issue paper BL?

The prevailing view is that these rules do not require paper BL unless the shipper requests one.[51] Shippers who are Bolero users are unlikely to demand paper BL, as this would defeat the purpose of joining Bolero.[52] But can the carrier issue BL electronically under these Rules?

- On the one hand, since these Rules were drafted in an age where technology was less advanced, it is unlikely that the drafters would contemplate an electronic BL or document.[53]

- On the other hand, neither Art 3.3 nor Art. 14.1 expressly requires BL to be in writing or on paper.[54] Contrast other provisions in the Rules, such as those requiring certain things to be 'furnished in writing by the shipper' or certain notices to be 'given in writing'.[55]

- Accordingly, the word 'issue' should take its normal grammatical meaning, enabling BL to appear on electronic media.[56]

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51 Feasibility Study at 44; R Caplehorn, above n 39 at 423; cf P Myburgh, 'Bits, Bytes & Bills of Lading: EDI & New Zealand Maritime Law' (1993) *New Zealand Law Journal* 324 at 329.

52 Feasibility Study at 10.

53 W H Van Boom, 'Certain Legal Aspects of Electronic Bills of Lading' (1997) 32 *European Transport Law* 9 at 15.
The Working Group in preparation of the Model Law found the approach of extending the definition of BL in the Hamburg Rules (to cover electronic transmissions) to be inappropriate. Any attempt to introduce such concepts as 'electronic BL' or 'electronic document' would be flawed, since the concepts of 'BL' and 'document' were rooted in practice and there existed no strict equivalents to such concepts in an electronic environment: J Clift, above n 1 at 313.

54 Sarel Du Toit, 'Towards Electronic Bills of Lading' (2000) *Financial Regulation & the Payments System – Current Issues & a South African Perspective* at 7; E Muthow, above n 10 at 4; Yiannopoulus, above n 7 at 12; L Cova Arria, 'Legal Obstacles to the Implementation of the Electronic Bill of Lading in Civil Law Countries' (1997) 32 *European Transport Law* 709 at 712.

55 Hague-Visby Rules Art. 3.3(a)(b) & 3.6.

56 Sarel Du Toit, above n 54 at 9; J Richard, *The Hague & Hague-Visby Rules* (4th ed, 1998) 23.

- By contrast, the Hamburg Rules appear to be 'media neutral'[57] and are therefore more likely to recognise BBL. This is because:

  (a) Art 1.8 defines '*writing*' as including 'inter alia, telegram and telex'. Despite making no reference to electronic means (contrast Art 14.3), this inclusive definition still leaves room for accepting new technologies as 'writings'.[58]

  (b) Art 14.3 provides that the *signature* on BL may be made by 'electronic means…if not inconsistent with the law of the country where the BL is issued'. Although this deals only with electronic signature, in the absence of any formality requirements under the Hamburg Rules, Art 14.3 implies that BL can be made electronically.[59] Indeed, it is almost impossible to have electronic signature on a paper BL.

  However, the proviso about 'the law of the country where the BL is issued' is potentially problematic as many countries are yet to recognise electronic signatures and documents. Moreover, where is the place of issue for BBL, since electronic environment is virtually borderless?

  This paper does not address this jurisdictional issue. Interestingly, Bolero is of the view that the Hamburg Rules are inadequate on their own to apply compulsorily to BBL, since Art 14.3 applies only to an electronic document which constitutes a BL under national law.[60]

Australian Hague-Visby Rules

Fortunately the Australian version of the Hague-Visby Rules confirms that BBL can be issued in compliance with Art 3.3.

- The new definition of '*writing*' in Art 1.1(h) includes EDI and entry in a database maintained on a computer system.

- The new Art 1A(1) confirms that the Hague-Visby Rules apply, with any necessary changes, to a sea carriage document in the form of a data message. Art 1A.2(a) clarifies that 'a sea carriage document is *issued* when a data message is generated in a way that constitutes issue of such a

57 WH Van Boom, above n 53 at 14.
58 Ibid at 13-14.
59 J Mo, above n 48 at 235; cf D Faber, above n 4 at 239.
60 Feasibility Study at 44.

document within the system being used by the parties to the relevant contract of carriage'.

Furthermore, s 4(4) of SCOGA defines 'signed' to include 'authenticated in any way that constitutes signing under the terms of the contract of carriage'.

Model Law

The Model Law also supports the writing and signature provisions in the Rulebook. Countries which have adopted the Model Law would therefore give legal efficacy to the creation of BBL.

- Art 5 prohibits information being denied legal effect solely on the ground that the information is in the form of a data message.

- In the context of issuing BL as receipt for goods,[61] Art 17(1) allows the carrier to use data message(s) to meet any writing or paper requirements.

- This derives from Art 6(1),[62] which allows a data message to satisfy writing requirements, if the information contained in the data message is '*accessible* so as to be *usable* for subsequent reference'. BBL satisfies this criterion as both the BBL Text and the Title Registry Record are 'accessible' (ie readable, interpretable and retained) and 'usable' by human or computer processing.[63]

- By digitally signing BBL, the carrier can also satisfy the *signature* requirement under Art 7(1) because this method:

  (a) *identifies* the carrier and that carrier's approval of the information contained in the BBL; and

  (b) is '*reliable*' as was appropriate for the purpose for which the BBL was generated, in light of all the circumstances, including any relevant agreement.

  Compliance with the Rulebook is arguably sufficient to satisfy Art 7. Subject to the later discussion on the Model Law requirements for

61 Model Law Art. 16(a)(iii).
62 Guide to Enactment of Model Law at 37.
63 See the interpretation of these words in the Guide to Enactment of Model Law at 24.

transferring BBL, the technical feasibility of Bolero and any relevant laws concerning data security are beyond the scope of this paper.

Transfer of BBL & Possession of Goods

A carrier can create a transferable BBL by designating 'To Order Party' (ie specific endorsee) or 'Bearer Holder' (ie blank endorsement).[64]

The Rulebook relies on the principles of attornment to transfer the constructive possession of goods by virtue of the carrier's electronic acknowledgment that it holds goods to the transferee's order.[65]

- Designating a new Bearer Holder or 'Holder-to-order', etc. shall effect transfer: r 3.4.1(1). (For ease of reference, this paper will use the word '*transferee*' instead of the various types of Holders.)

  Users designate by sending instructions to the Title Registry. The Title Registry then notifies the transferee and updates the relevant information in the Title Registry Record (which is linked to the BBL Text) by cancelling the transferor's title.[66]

- Upon the transferee's acceptance of the designation, the carrier shall acknowledge that from that time on it holds the goods to the transferee's order: r 3.4.1(2).

- For the purposes of such acknowledgment, the carrier irrevocably appoints Bolero International[67] as its agent: r 3.4.2.

Attornment[68] is an established feature of English law, even though it is not commonly used.[69] Reliance on this concept to achieve electronic transferability

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64 Bolero Rulebook r 3.3(2).
65 Feasibility Study at 63-64; S Taylor, above n 1 at 2; R Caplehorn, above n 39 at 423.
66 See Operating Procedures at 56ff.
67 The Rulebook defines 'Bolero International' as Bolero owners or operators or their successors in title: r 1.1(14).
68 Attornment is also known as the 'rule in *Griffin v Weatherby*' (1868) LR 3 QB 753 – 'if a debtor at the request of his creditor promises to pay the transferee, legal title to the debt as it exists at that time will be transferred'. The transferee need not participate in this transaction: D E Allan & M E Hiscock, *Law of Contract in Australia* (2nd, 1992) 214.
Attornment operates by way of estoppel: Feasibility Study at 62.
69 S Taylor, above n 1 at 2.

may not be necessary in light of the following discussion on the Model Law, COGSA and SCOGA. Consequently, whether a carrier's acknowledgment needs to be in writing is unlikely to be an issue in Australia.[70]

The Hague-Visby Rules & the Hamburg Rules

These Rules merely recognise that a BL is transferable, without prescribing any transfer procedures or formalities.[71] Consequently, the transfer provisions in the Rulebook fit well with these Rules, provided that the Rules recognise BL in electronic form.

In contrast, Art 1A.2(b) of the Australian Hague-Visby Rules expressly recognises the transfer of BL 'when a data message is generated in a way that constitutes *transfer* of [BL] within the system being used by the parties'. This reinforces the Rulebook's compatibility with the the Hague-Visby Rules on this issue.

SCOGA

BL is capable of transfer by endorsement or delivery.[72]

Section 4 concerns '*electronic and computerised sea-carriage documents*'. It is media neutral as it applies SCOGA to sea-carriage documents in the form of data message and the 'communication'[73] of sea-carriage documents by means of data message:

- in the same way as SCOGA applies to written sea-carriage document and the communication of sea-carriage document by other means (s 4(1)(2)); and

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70 However, see the Feasibility Study for the positions in other jurisdictions.

71 Art 1.7 of Hamburg Rules provides that a BL can provide for the delivery of goods 'to the order of a named person, or to order, or to bearer'. Art 16.3(b) of Hamburg Rules and Art. 3.4 Hague-Visby Rules also state that the presumption that a BL is evidence of carrier's receipt of goods is irrebuttable if the BL has been transferred to a third party acting in good faith.

72 SCOGA s 3 (definition of 'bill of lading').

73 Use of the word 'communication' instead of 'negotiation' or 'transfer' may lead to some uncertainty. However, it has the advantage of avoiding any implication that an electronic BL must be negotiated or transferred (strictly speaking there is no transfer of BBL as entries are merely made in the Title Registry): Sarel Du Toit, above n 54 at 25.

- in accordance with the procedures *agreed between the parties to the contract of carriage* (s 4(3)).

Furthermore, the following inclusive definitions in s 4(4) allow parties to the carriage contract to agree on the procedures for transferring BL by delivery or endorsement in an electronic environment:[74]

- 'delivery' includes any form of communication that constitutes *delivery* under the terms of the contract of carriage;

- 'endorsement' includes any form of authorisation that constitutes *endorsement* under the terms of the contract of carriage; and

- 'possession' of the document includes being in receipt of the document in any way that constitutes *possession* under the terms of the contract of carriate;

Although s 4(4) may mean that BBL need not rely on attornment principles to achieve electronic transferability, it nevertheless raises some questions of interpretation.

- To what extent can parties agree on the relevant procedures, especially where these procedures depart from SCOGA[75] or the Model Law?

- SCOGA defines '*contract of carriage*' as the contract contained in or evidenced by BL.[76] The Rulebook refers to, but does not define this phrase. A contract of carriage seldom defines delivery, endorsement and possession of BL, especially in the case of Bolero, as users would simply rely on the Rulebook. Does this mean that, because the contract is silent on the matter, the common law (rather than SCOGA) will apply to determine whether BL is delivered, endorsed or possessed?

  SCOGA does not answer this question, although it has been suggested that the common law will govern the issue.[77] This raises the potential problem that the common law (which treats BL as a personal chattel) will not recognise delivery, endorsement or possession of BL by electronic means.

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74 Ibid at 26; Explanatory Notes on SCOGA at 4.
75 Ibid at 26.
76 SCOGA s 3.
77 Sarel Du Toit, above n 54 at 26.

Fortunately, there are at least three ways to avoid this problem (in ascending order of preference):

(a) Rely on the more general provisions in s 4(1)(2). These apply SCOGA, with necessary changes, to sea-carriage documents in the form of data message and communication of sea-carriage documents by means of data message.

(b) Incorporate the relevant provisions in the Rulebook into the BBL Text (which contains or evidences the contract of carriage).

According to the Rulebook, a carrier can incorporate external terms and conditions by expressing in the BBL Text and indicating whether such terms and conditions can be found and read.[78] The effect of incorporation is that such terms and conditions bind the parties to the carriage contract.[79]

(c) Adopt the language used in Art 1A.2 of the Australian Hague-Visby Rules by substituting 'under the terms of the contract of carriage' in s 4(4) and 'agreed between the parties to the contract of carriage' in s 4(3) with '*within the system being used by the parties to the relevant contract of carriage*'.

This would enable Bolero users to use the common procedures within the Bolero system, without having to incorporate these procedures into their contracts.

Model Law

In order to remove legal barriers concerning physical delivery and endorsement of original paper BL, the Model Law provides for the electronic equivalent of 'transferring or negotiating rights in goods', subject to certain requirements.[80] It differs from the Australian approach, which leaves the parties to agree on the transfer requirements.

- Art 17(1)(3) - Use of data message(s) will satisfy writing or paper requirements, 'provided that a *reliable* method is used to render such data

78 Bolero Rulebook r 3.2(1).
79 Bolero Rulebook r 3.2(2).
80 Model Law Art. 16(f); Guide to Enactment of Model Law at 37-38.

message(s) *unique*', and provided that the transfer is to 'one person and no other person'.

- Art 8(1) - Use of data message(s) will also satisfy originality requirements (ie presenting or retaining information in its original form) if:

  (a) there exists a reliable assurance as to the *integrity* of the information from the time when the information was first generated in its final form; and

  (b) the information is capable of being displayed to the person to whom it is to be presented.

Accordingly, the Rulebook provisions concerning transfer of possession in goods are compatible with the Model Law, so long as user's Title Registry Instructions meet the requirements of reliability, integrity, singularity and uniqueness.

- Art 17(4) merely requires the standard of *reliability* to be assessed in light of all the circumstances, including any relevant agreement between the parties. It has been criticised for giving insufficient guidance on what constitutes 'reliable method'.[81]

- The criteria for assessing *integrity* in Art 8(3)(a) are 'whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display'. According to the Guide to Enactment of Model Law[82], as long as the contents of a data message remain complete and unaltered, necessary additions to that data message would not affect its originality.[83] An electronic certificate added to attest the originality of a data message is an example of such a 'necessary addition'.[84]

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81 HP Lowry, 'The 1996 United Nation's Commission on International Trade Law Model Law on Electronic Commerce & Guide to Enactment' (1999) 5 ILSA *Journal of International & Comparative Law* 433; GI Zekos 'The Use of Electronic Technology in Maritime Transport: the Economic Necessity and the Legal Framework in European Union Law' [1998] 3 *Web Journal of Current Legal Issues* [Web document] Available: <http://webjcli.ncl.ac.uk/1998/issue3/zekos3.htm>.

82 Above n 22.

83 Guide to Enactment of Model Law at 27.

84 Ibid at 27-28.

Bolero seems to satisfy this requirement as changes to the Title Registry Record made by the Title Registry are arguably 'necessary additions' resulting from the transferor's Title Registry Instruction. The contents of the BBL Text also remain complete and unaltered.

- *Singularity* and *uniqueness* seek to prevent the transferor from transferring to more than one transferee at a time by sending multiple messages.

  The Working Group on the Model Law recognised that the word 'unique' may lend itself to misinterpretation. On the one hand, all data messages are necessarily unique, even if they duplicate an earlier data message (as each data message is sent at a different time, or to a different person). On the other hand, if 'unique' is interpreted as referring to a data message of a unique kind, or a transfer of a unique kind, then in that sense no data message is unique, and no transfer by means of a data message is unique.[85]

  Uniqueness of paper is a magical quality as an electronic document cannot be unique on its own.[86] It has been suggested that the only way at present to replicate this quality is to use a registry (in addition to cryptography)[87], through which the transferee can register its rights.

  This is what Bolero has done – using the Title Registry to register users' rights and obligations in relation to BBL in accordance with users' instructions. The Rulebook also prohibits more than one holder of BBL at any time.[88]

Without examining Bolero's security measures in detail, Bolero appears to satisfy the minimum standards imposed by the Model Law, unless there are more stringent requirements under national laws. Apart from the Title Registry, the Core Messaging Platform and User Database perform functions such as user identification, access controls, certification of private keys, verification of digital signatures and message encryption.[89] Furthermore, the Rulebook requires users to implement all necessary measures for private key and site security,[90] as well

85 Guide to Enactment of Model Law at 38
86 Sarel Du Toit, above n 54 at 34.
87 Ibid at 9; J Clift, above n 1 at 313.
88 Bolero Rulebook r 3.8(5).
89 See Operating Procedures at 6-11.
90 Bolero Rulebook r 2.2.4.

as to observe 'compulsory requirements' and 'regulations' relating to the form, content, protection and encryption of data.[91]

These obligations raise an interesting conflict of laws question. A user's contravention of any Australian laws relating to the form, content, protection or encryption of data would also constitute breach of the Rulebook. The Rulebook gives English courts exclusive jurisdiction with respect to breaches of the Rulebook.[92] If Australian laws were applicable, then this jurisdiction clause could contravene s11 of COGSA, on the basis of ousting the Australian courts' jurisdiction.

Novation of Carriage Contract

Transfer of BBL by designating certain types of transferee also transfers the carriage contract to the transferee.[93] Pursuant to the Rulebook, the carrier, shipper, transferor (ie the immediately preceding BBL holder) and transferee (ie the new BBL holder) agree that:

- upon the transferee's acceptance of the designation, a carriage contract shall arise between the carrier and the transferee on the terms of the carriage contract as contained or evidenced by the BBL Text (r 3.5.1(1));

- the transferee shall be entitled to all right and accepts all liabilities of the carriage contract as contained in or evidenced by BBL (r 3.5.1(2)); and

- the transferor's rights and liabilities under its contract with the carrier shall immediately cease and be extinguished. However, if the transferor is also the shipper, then only its rights under its contract with the carrier shall cease and be extinguished (r 3.5.1(3).

By using *novation* (as opposed to *assignment*), Bolero seeks to avoid written requirements for assignment and the inability to transfer liabilities by assignment[94] in some countries This approach mirrors the English-based bills of

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91 Bolero Rulebook r 2.3(3).
92 Bolero Rulebook r 2.5(3).
93 Bolero Rulebook r 3.5.1; Operating Procedures at 94: Novation only arises from designation of a new 'Holder to order' or 'Consignee Holder'. A 'Consignee' is the party to whom delivery of goods must be made by the carrier: r 1.1(21). A BBL becomes non-transferable upon designation of Consignee Holder: r 3.3(6).
94 J Bailey, above n 20 at 203.

lading legislation,[95] which deems the transfer of rights and liabilities under the carriage contract to occur upon the transfer of BL.

It follows that if a carriage contract can be electronic in form, so can novation of the carriage contract.[96] The current Australian bill of lading legislation supports this view.

SCOGA

As previously mentioned, SCOGA applies to (and therefore recognises) BBL. Assuming that Bolero's approach to transferring BBL is compatible with SCOGA, then most of the above provisions in the Rulebook concerning novation of carriage contract would also comply with SCOGA.

- **Rule 3.5.1(1)** – Section 6(1) of SCOGA also deems that all rights under the carriage contract in relation to a BL are transferred to a successive lawful holder of the BL.

  However, transfer of liabilities under the contract of carriage only arises if the new holder of BL exercises certain rights under the carriage contract – namely, demanding or taking delivery from the carrier, or making a claim under the contract against the carrier in relation to the goods (s 8(1)). This raises the need to reconcile Rule 3.5.1(1) with s 8(1) – the former seems to provide for the simultaneous transfer of rights and liabilities under a carriage contract upon the transferee's acceptance, whereas the latter requires the transferee to exercise some rights before assuming liabilities under the carriage contract.[97] The practical significance of this distinction is that, before s 8(1) applies, a shipper cannot sue the transferee under SCOGA but the shipper can do so pursuant to the Rulebook. This may not be a major problem since 'Holder to order' and 'Consignee Holder' are the only persons who are entitled to the delivery of goods under the Rulebook.[98] However, s 8(1) seems somewhat unfair as the shipper remains liable under the carriage contract despite losing its rights under the carriage contract.

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95 Feasibility Study at 64.
96 Feasibility Study at 64, 72.
97 According to the Explanatory Notes on SCOGA (at 6), s 8 provides that when any person entitled to sue takes or demands delivery or otherwise makes a claim against the carrier, the person becomes subject to any contractual liabilities as if the person had been a party to the contract of carriage.
98 Bolero Rulebook r 3.6.

- **Rule 3.5.1(2)** – Subject to the above inconsistency, this rule fits well with s 6(2) and s 8(2) of SCOGA, which vest rights and liabilities respectively in the transferee, as if the transferee had been the original party to the carriage contract.

- **Rule 3.5.1(3)** – Section 7(1) of SCOGA also extinguishes the transferor's previous rights under the carriage contract.

  On the other hand, s 9 states that the transfer of liabilities does not affect the original parties' liabilities under the carriage contract. Since 'original parties' are confined to shipper and carrier, [99] rule 3.5.1(3) is compatible with s 9.

Model Law

Previous discussions on Articles 8 and 17 of the Model Law also apply to 'acquiring or transferring rights and obligations under the contract [of carriage]'.[100] Consequently, if Bolero's transfer of BBL is compliant with these provisions, so will the novation of the carriage contract.

'Switch to Paper' Option

Rule 3.7 entitles BBL holder to demand that the carrier issue a paper BL at any time before delivery of goods. This is desirable (if not necessary) for avoiding the risk that the Hague-Visby Rules, the Hamburg Rules or national laws might require issuance of paper BL. Customs and other government authorities might also require paper documents for certain goods and other purposes.[101] Moreover, Bolero needs to cater for the less technologically advanced parts of the world,[102] as well as for parties who cease to be Bolero users.[103]

In light of the following comparisons, is Rule 3.7 consistent with Art 17(5) of Model Law? Can these provisions effectively deal with situations where a carrier deliberately issues both an electronic BL and a paper BL?[104]

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99 Explanatory Notes on SCOGA at 6.
100 Model Law Art. 16(g).
101 Feasibility Study at 15; E T Laryea, 'Paperless Shipping Documents: An Australian Perspective', above n 23.
102 S Taylor, above n 1 at 5; Guide to Enactment of Model Law at 39.
103 Operating Procedures at 89.
104 See Sarel Du Toit, above n 54 at 32-33.

- The Rulebook does not provide for conversion from paper BL to electronic BL whereas the Model Law does not exclude such a conversion.[105]

- Rule 3.7(1) provides that BBL shall cease to be effective as from carrier's issuance of paper BL, and users can no longer instruct the Title Registry in relation to BBL. This suggests that BBL cease to be valid when their paper equivalents are issued.

  Art 17(5) provides that a paper document is valid only if use of data messages has been terminated and replaced by use of paper document.[106] This suggests that a paper BL, whether issued after or before its electronic equivalent, is valid only if its electronic equivalent is terminated and only if it is replacing its electronic equivalent. This approach has been criticised as being unfair towards holders of paper BL.[107]

  Similarly, Rule 3.7(3) gives preference to BBL in the event of any discrepancy between BBL and paper BL. This seems reasonable since paper BL can be issued only after its equivalent BBL. Yet query whether a court will be 'so brave'[108] as to prefer a BBL to a paper BL.

- Rule 3.7(2)(b) requires a paper BL to have a statement to the effect that it originated as a BBL. There is a similar requirement in Art. 17(5).

- Art 17(5) also states that replacement of data messages by paper documents shall not affect the parties' rights or obligations. This raises the question of enforcement by a holder of paper BL who is not a Bolero user (*third party*).

  A third party is not subject to the Rulebook and may therefore be unaffected by Rule 3.7(3), which gives preference to BBL in the event of discrepancy. The contents of paper BL seem to adequately safeguard the third party's right of suit and other remedies. Rule 3.7(2) requires the carrier to issue a paper BL setting out all the data, terms and conditions contained in the original BBL Text, as well as a record of chain of users

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105 Guide to Enactment of Model Law at 39.
106 The Model Law leaves the enacting countries to define the word 'terminated' or provide for circumstances of termination: Guide to Enactment of Model Law at 39.
107 Sarel Du Toit, above n 54 at 32.
108 Ibid at 33.

which have been parties to the carriage contract with the carrier from the date of the creation of BBL.[109]

In addition, Bolero's internal sanctions (including liability for breach of the Rulebook and exclusion from the Bolero system) may be sufficient to deter such a fraudulent conduct by the carrier.

Legal Status of BBL

Australian Perspective

Owing to the recent changes to COGSA and the enactment of SCOGA, Australian law seems to treat BBL in the same manner as paper BL, although none of these legislative reforms has been judicially interpreted in Australia at the time of this paper.[110] Both statutes recognise the status and dealings with BL in an electronic environment, leaving the parties to agree on the procedures. While BBL can operate in Australia pursuant to the Rulebook, certain provisions in the Rulebook such as the jurisdiction clause may not have full effect in Australia.

International Perspective

Unlike Australia, many countries do not regard electronic messages as capable of being a BL or document of title. Bolero's Legal Feasibility Study found that certain countries still require paper documents, although the 'switch to paper' option partially overcomes this problem. This paper does not examine the position of BBL in other countries, but suggests that BBL can operate at international level by a combination of the following:

- Domestic courts recognise and apply the choice of English law in accordance with the Rulebook.[111]

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109 Presumably this can overcome the problem as identified in S Taylor, above n 1 at 8.

110 E T Laryea, 'Bolero (Electronic) Trade System – An Australian Perspective', above n 23;
E T Laryea, 'Paperless Shipping Documents: An Australian Perspective' above n 23.

111 Email from Anatul Fateh (Legal Counsel of Bolero International) to Winnie Ma dated
7 November 2000 re Bolero Rulebook and Bills of Lading – Legal Aspects (anatul.fateh@bolero.net).

- Nations (especially leading trade nations)[112] adopt the Model Law, either by enacting BBL-enabling laws similar to Australian law, or as rules of interpretation to extend the application of their domestic laws to BBL.

  As at 2 November 2000, legislation based on the Model Law has been adopted in Australia, Bermuda, Colombia, France, Hong Kong, Ireland, Korea, Singapore, Slovenia, the Philippines, States of Jersey, US and Canada.[113]

- Parties agree to communicate electronically, such as incorporating the Rulebook, Incoterms 2000 (A8 and B8 clauses) or CMI Rules (ie International Maritime Committee Rules for Electronic Bills of Lading 1990).

  The Rulebook is partially based on the CMI Rules, which do not seem to have been adopted by any major traders since their inception.[114]

  - Customs and other government authorities computerise their systems and thereby eliminate paper requirements.

  - Amend the Hague-Visby Rules (unlikely in the short term)[115] or enact a modified version of the Hague-Visby Rules at domestic level similar to the Australian Hague-Visby Rules.

  - More traders and international organisations adopt Bolero or similar electronic systems to develop trade usage and custom.

The last two points are of particular interest.

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112 WH Van Boom, above n 53 at 18.

113 UNCITRAL, *Status of Conventions & Model Laws* [Web document version] Available: <http://www.uncitral.org> [5 December 2000]; Guide to Enactment of Model Law at 12.

114 E Muthow, above n 10 at 7; D Faber, above n 4 at 242; W H Van Boom, above n 53 at 12.
See the discussion of CMI Rules in Burnett R, above n 16 at 88-92; Chandler GF, 'Maritime Electronic Commerce for the 21st Century' [1998] 22 *Tulane Maritime Law Journal* 463 at 474ff; G J Van Der Ziel, 'Main Legal Issues Related to the Implementation of Electronic Transport Documentation'(1997) 32 *European Transport Law* 715 at 717; R B Kelly, 'The CMI Charts a Course on the Sea of Electronic Data Interchange: Rules For Electronic Bills of Lading' [1992] 16 *Tulane Maritime Law Journal* 349.

115 WH Van Boom, above n 53 at 23.

When will the Australian Hague-Visby Rules apply to BL?

This modified version of the Rules has the force of law in Australia[116] after December 1998 with respect to interstate carriage (excluding intrastate carriage),[117] outward carriage from Australia[118] and inward carriage to Australia.[119]

But will it apply elsewhere?

116 COGSA s8; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* [1998] HCA 65 per McHugh J.
117 COGSA s10(1)(b)(iii), (2); Australian Hague-Visby Rules Art 10.4.
118 COGSA s10(b)(i); Australian Hague-Visby Rules Art. 10.1.
119 Australian Hague-Visby Rules Art 10.2 (See later discussions on the exceptions to this general rule.)

- **Express choice**
  An obvious situation is where the contract chooses Australian law or incorporates the Australian Hague-Visby Rules as enacted in COGSA.[120]

- **Outward carriage**
  If the carriage is to a country such as the UK, which adopts the original version of the Hague-Visby Rules, then English courts may well apply the original version of the Rules without even considering the Australian version.[121]

  The choice of law provision in s 11(1) of COGSA also raises similar issues. It deems the laws of the place of shipment to be chosen by parties to the contract of outward carriage. If the country of shipment is not Australia, does this mean that this foreign country would apply both its domestic laws and the Australian Hague-Visby Rules? The issue becomes more difficult if that country has adopted the Hague-Visby Rules without any modifications.

- **Inward carriage**
  The Australian version applies to inward carriage unless one of the Conventions (ie Hague, Hague-Visby and Hamburg Rules) or their modification by another country applies to the carriage '*by agreement or by law*, or otherwise has effect in relation to the carriage'.[122]

  There are very few maritime countries in this category, as most of them have adopted one of the three sets of Rules.[123] However, some countries which have adopted the Rules in a piecemeal or hybrid fashion (eg China,

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120 M Davies, 'Australian maritime law decisions 1997' (1998) *Lloyd's Maritime & Commercial Law Quarterly* 394 at 395; M Davies, 'Australian maritime law decisions 1998' above n 27 at 406.

121 Ibid, citing *The Hollandia* [1983] 1 AC 565.

122 Australian Hague-Visby Rules Art 10.2; S Hetherington, 'Australian Hybrid Cargo Liability Regime' (1999) *Lloyd's Maritime & Commercial Law Quarterly* 12 at 14.

123 M Davies, 'Australian maritime law decisions 1997' above n 120 at 396. See also the list of countries which have adopted Hague Rules or Hague-Visby Rules in Appendix II to J Richardson, *Hague & Hague-Visby Rules* (4th ed, 1998). For the Hamburg Rules, see UNCITRAL, *Status of Conventions & Model Laws* as at 2 November 2000 [Web document version] Available: <http://www.uncitral.org> [5 December 2000].

Vietnam and US).[124] The Australian version is potentially applicable to these countries on the basis that such foreign version cannot be regarded as a 'modification' of any one set of Rules.[125]

Thus it seems that the Australian version has limited application outside Australia, as most of the above conflict of laws issues remain unresolved. Fortunately, only a small portion of the Hague-Visby Rules concerns BBL.

Will BBL become custom?

Many agree that BBL may eventually acquire the status of negotiability equivalent to paper BL by mercantile custom.[126] The criteria for determining whether a particular usage has become mercantile custom include level of acceptance, duration and intensity of usage.[127] If BBL becomes the normal practice for a significant proportion of world trade, then the Rulebook will be elevated from mere 'private law in a closed system' to become part of the merchant law.[128] For instance, the International Commerce Chamber's adoption or recommendation of the Rulebook would speed up the process.[129]

Apart from technological barriers, this will require both legal and conceptual revolutions:

- Focus not on the written, signed and original document, for it is the agreed process that inspires confidence in a particular medium (which is presently paper) and thereby achieves negotiability.[130]

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124 M Davies, 'Australian maritime law decisions 1997' above n 120 at 396; M Davies, 'Australian maritime law decisions 1998' above n 27 at 407.

125 Ibid.

126 S Taylor, above n 1; Feasibility Study at 42; E T Laryea, 'Bolero (Electronic) Trade System – An Australian Perspective', above n 23.

127 *Edelstein v Schuler & Co* [1902] 2 KB 144 at 154 per Bingham J (cited in E T Laryea, 'Paperless Shipping Documents: An Australian Perspective', above n 23). See also B Kozolchyk, 'The Paperless Letter of Credit & Related Documents of Title' [1992] 55 *Law & Contemporary Problems* 39 at 94-97.

128 Sarel Du Toit, above n 54 at 35.

129 A Nilson (1999) *Development of International Law Inside Closed Groups* [Web document version] Available: <http://www.ilpf.org/confer/present99/nilsonpr.htm> [6 November 2000] at 7.

130 G F Chandler, above n 114 at 469-71; R Goode, *Commercial Law in the Next Millennium* (1998) 96-98.

- BBL is still a BL (a new species, but a functional equivalent, of BL), even though it has different nature and employs different procedures to achieve the same results.[131]

At least Australia is ready for BBL.

131 Sarel Du Toit, above n 54 at 35; ET Laryea, 'Bolero (Electronic) Trade System – An Australian Perspective', above n 23.