

**CARRIAGE OF GOODS BY SEA -
CHANGES CONSIDERED BY CMI
AND RECENT CHANGES TO US LAW**

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CARRIAGE OF GOODS BY SEA
CHANGES BEING CONSIDERED BY CMI
AND
RECENT (PROPOSED) CHANGES TO US LAW

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MLAANZ, PALM COVE, QLD, AUSTRALIA
MONDAY, 28TH SEPTEMBER 1998

For the vast majority of persons who have ever heard of the CMI – let alone of those who occasionally think of the CMI – it is probable that the first area of the Comité's work to come to mind is carriage of goods by sea. The Hague-Visby Rules and the York-Antwerp Rules are seen as the CMI's crown jewels; both (with periodic adjustments) have served as the basic law of international ocean carriage for over 70 years. So when we contemplate proposals that would make fairly drastic alterations to some of the core principles of the Hague-Visby regime, it is natural to question the necessity for such change.

For good historical reasons and not solely out of chauvinism, what I have to say today begins and ends with the domestic legislation of the United States. As the 'official history' of the Hague Rules makes clear,¹ the first impetus towards an international convention on bills of lading was the enactment of the Harter Act in the USA² three years before the founding of the CMI. The Harter Act was followed by domestic legislation in a few countries – notably in Australia, New Zealand, Canada and the Baltic States – before the Comité began its preparatory work on the Hague Rules. It is not too early in this disquisition to point out the obvious historical parallel with the current situation in ocean transport law.

Although I have learned a great deal by attending as a delegate at the Hamburg Rules Conference in 1978 and later by serving as Rapporteur of the CMI International Sub-Committee on Uniformity of the Law of Carriage of Goods, my own experience in law practice has not been primarily in this area; so I will avoid embarrassing myself and boring my listeners by attempting a dissection of either Hague-Visby or Hamburg. The problem at the threshold of the 21st Century is only in a minor sense the relative merits of these two competing liability regimes – the major problem is that they are *only* liability regimes. Important as that is, determination of liability for loss, damage and delay during the period of carriage is only one aspect of the legal regime of sea transport. The form, negotiability and bankability of transport documents, the status of electronic transport documents, the problems of the sealed container, the multimodal transport document, the status of electronically interchanged shipping data – these are just some of the non-liability issues that need to be addressed by uniform international law. The transfer of liability upon changes of transport mode when the principal mode is by sea, the liability arising within the port or terminal, liability in an out-of-port warehouse or

¹ *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules*, F. Berlingieri, Antwerp, 1977, p. 17.
² 1893.

container yard under a through bill, liabilities of the stevedore and the producer – all these are quite everyday matters of liability left completely or largely untouched by both Hague-Visby and Hamburg.

It is of course natural given the historical membership of the national associations of maritime law – chiefly lawyers, insurers, average adjusters and shipowners – that the question of liability arising during carriage by sea should have been the central focus of the CMI's attention to this area of international law for the past century. Not until the latter years of the 20th Century has the CMI become active with regard to the non-liability issues arising in ocean transport, but meanwhile the unavoidable necessity of dealing with them has given rise to legislation in many countries, commencing with the Pomerene Act in the US.³

The Comité has continued its work on liability over the past decade by means of an International Sub-Committee prior to the Paris Conference of 1990, a Committee at the Paris Conference, and more recently a re-constituted International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea (which will meet for its 4th Session in London on 9 and 10 November). It is fair to say that the CMI's efforts prior to 1996 were aimed primarily at forestalling wider spread of the Hamburg Rules by updating and promoting Hague-Visby, and these have enjoyed success to the extent that a number of countries including Japan, Canada, Australia and New Zealand have postponed implementation of Hamburg and have opted for Hague-Visby (modified, in some cases) for the further "short term". However, the work begun in the late 1980's both by the CMI alone with regard to Seawaybills and in cooperation with both BIMCO and ICC with regard to the Electronic Bill of Lading in particular and electronic documentation in general, together with the adoption of CMI rules on these first two subjects in 1990, have had a growing influence on the perception of both Hague-Visby and Hamburg. The change that has taken place in the past three years was foreshadowed at the 1994 Sydney Conference by widely-discussed apprehension, on the one hand at the efforts of some States and international organizations to promote accession to the Hamburg Rules and on the other at the increasing pace of enactment or pending enactment of national legislation deviating from the rules of Hague-Visby. Accessions to Hamburg have chiefly been by lesser-developed States, and have seldom been accompanied by actual implementation of Hamburg. At the same time, political pressure to accede to Hamburg drove a number of States to adopt a statutory "trigger" mechanism whereby accession would come about when and if a majority of major trading partners have acceded to Hamburg.

The conditional commitment to a long-term "transition" to Hamburg – whether fact or fiction – has given a number of major maritime and trading States a self-license to tinker in the interim with Hague-Visby in order to begin to implement some attractive features of Hamburg and to add modifications and features that are desirable in view of peculiar national conditions of trade (otherwise known as self-interest). The Scandinavian States have acted *en bloc* – and of course Australia and New Zealand have acted independently – to bring in national legislation which has many features of Hague-Visby, some features of Hamburg, and some innovations. Now similar action is imminent in the United States. The feature common to these enactments is their disuniformity with regard to Hague-Visby and to each other, and the varying degree to which they incorporate Hamburg provisions.

What these developments demonstrate is that neither Hague-Visby nor Hamburg is an adequate regime of international law for the present, let alone the future. Remarkably, this clear realization has now come to the chief protagonists of both Hague-Visby and Hamburg – the CMI and UNCITRAL. I will assume that all present know the CMI and its structure, but some may not be as

³ Federal Bills of Lading Act, 49 U.S.C. §§ 81 – 124 (1917).

familiar with UNCITRAL – the United Nations Commission on International Trade Law. With apologies to those who are generally indifferent to the massive structure of the United Nations, it is not possible for me to explain the future work of the CMI unless the role of this organization is clearly understood. UNCITRAL was established in 1966 and is a subsidiary body of the General Assembly. It is headquartered in the UN Center in Vienna and its Secretariat is the International Trade Law Branch of the UN's Office of Legal Affairs. The Commission's principal civil servant, the Secretary, is Chief of the Trade Law Branch and the other members of the Branch legal staff serve the Commission in specific assignments; the Trade Law Branch is one of the very smallest and may be the most efficient secretariat office in the United Nations. The Commission itself is composed of 36 member States elected by the General Assembly to staggered terms of six years; it meets annually (alternately in New York and Vienna) and elects its own Chairman, three Vice-Chairmen and Rapporteur.⁴

That UNCITRAL should have taken up the subject of carriage of goods by sea is probably explained historically by a rivalry that existed in the 1970's between UNCITRAL and another organ of the General Assembly, UNCTAD,⁵ which entered the maritime field in 1972 with its Convention on a Code of Conduct for Liner Conferences. The prevailing mood of the time was third-world economic militancy, reflected for example in the formation of OPEC, which held as its essential tenet that the international economic and related legal structure was oppressive and had been devised by the great mercantile nations of the Northern Hemisphere to appropriate the resources and wealth of the South. The CMI was seen as an archetypal organization of the North, and Hague-Visby as an instrument whereby the North's capitalist ocean carriers perpetuated an advantage over the consignees of the developing world – such consignees often being third world governments themselves. UNCITRAL had by this time established its jurisdiction over banking and financial matters, and bills of lading not surprisingly were taken to fall within this ambit. I attended some of the later UNCITRAL working group sessions chaired by Professor Selvig that prepared the draft Convention as well as the Hamburg Conference itself. Both were frequently interrupted by meetings of the "Group of 77", ably chaired by Sr. Castro of Mexico, and what the Chairman of the First Committee of the 1978 Conference, Mr. Chafik of Egypt, lacked in understanding of the subject he made up in affability. I will not bore you with war stories of the Hamburg Conference, but suffice it to say that the arguments advanced in favor of the significant departures from Hague-Visby were based upon politics and economics, and relatively little attention was paid to maritime law or the realities of sea transport.

The Hamburg Conference was followed by a full-court press for ratifications, yet the minimal criterion for entry into force⁶ was not met for over fourteen years from adoption of the Convention, and to this day Hamburg is not in force for any of the world's major trading nations. At the meeting of UNCITRAL in June of 1994, eighteen months after entry into force, the CMI highlighted the shortcomings of both Hague-Visby and Hamburg and the increasing disuniformity in this vital area of international trade law. A majority of interventions of Commission members in the discussion of the status of the Hamburg Rules was still militantly insistent on widespread accession to Hamburg as the only acceptable solution, but several delegations of developing nations not parties to Hamburg openly questioned whether it was not time to consider alternatives or modifications to make the regime more attractive to major trading and shipping States. This meeting was followed by the first serious discussions between the UNCITRAL Secretariat and officers of the CMI on possible ways to break the deadlock between Hague-Visby and Hamburg; the understandable wariness and suspicion at the

⁴ For more information on UNCITRAL, see *Benedict on Admiralty*, Vol. 6F, Doc. No. 22-8.

⁵ The United Nations Conference on Trade and Development. See *Benedict, supra*, Vol. 6F, Doc. No. 22-9.

⁶ Deposit of the twentieth instrument, without qualification as to the trading or shipping status of any of the 20 States. Article 30 (1).

outset of these discussions rapidly and totally dissipated in the light of professionalism, and the October 1994 CMI Conference in Sydney was the first ever attended by a representative of UNCITRAL. At the June 1996 meeting of the Commission a proposal by the Secretariat was adopted, calling for a study of the problems of transport by a group of international organizations headed by the CMI, with a report as to possible solutions to be made to the Commission. Implicit in this action was a recognition by the Commission that widespread acceptance of the Hamburg Rules – even if this were attainable – could not resolve the present-day legal problems of sea transport. The growth of disuniformity in recent provisions of national laws is the most graphic demonstration of the reality that present international law is simply inadequate in scope to deal with international transportation of goods in the 21st Century.

This brings me, finally, to the first subject of my discourse – the current work of the CMI in this area. Firstly, as I have mentioned, the work of the International Sub-Committee on Uniformity, under the Chairmanship of Professor Berlingieri, continues to examine the issues of liability; but one difference from the past is that representatives of UNCITRAL have not only been attending but also participating in the work. Secondly, following a visit in early 1997 to UNCITRAL Headquarters by then CMI President Allan Philip and Honorary President Francesco Berlingieri, a Steering Committee of the Executive Council was formed to co-ordinate the activities of the Comité with regard to the project outlined in the 1996 UNCITRAL Report. Thirdly, the future course and method of work were described and discussed in general terms at the Centenary Conference of the CMI and the following Assembly in Antwerp in June 1997. Fourthly, following two meetings of the Steering Committee (California, October 1997 and Zürich, April 1998), the CMI convened a meeting in London on 11 May of the principally concerned international organizations⁷ to consider the scope and method of work on the project; there was unanimous consent that the scope should be broad and that the CMI should organize and chair the work, with full participation of representatives of the other organizations in the work of an International Sub-Committee (IS-C). Fifthly, following the recommendation of the Steering Committee to the Executive Council and Assembly on 14 / 15 May, a first meeting was held in London on 2 June of the Working Group on Issues of Transport Law (“ITL”) the Chairman of the Working Group is Stuart Beare of the BMLA and the Rapporteur is Prof. Michael Sturley of the MLAUS, both of whom will serve in the same capacities on the IS-C when it is eventually formed.

As you see, there has been a rapid development of events. At the UN in New York on 9 June a full progress report was made by the UNCITRAL Secretariat to the Commission; although we had the support of eight member delegations ready to be voiced, the report was approved by the Commission without comment. The next task is that of the Working Group on ITL, which will define the issues to be studied, prepare an agenda for the work of the IS-C on ITL, and perhaps make a first broad draft outline of the structure of a future international instrument. Meanwhile the IS-C on Uniformity and the Working Group on Electronic Data Interchange (EDI) will continue their work and report to the Executive Council. All of these efforts will be co-ordinated by the Steering Committee.

The immediate goal is to prepare and deliver to UNCITRAL a study on ITL, and discussion of this work is bound to be one of the features of the next CMI Conference, currently scheduled for Singapore in early 2001. It is probably unrealistic to expect that the ITL Study could be ready in draft form within two years, but I am reluctant to rule out the possibility given the recent pace of events. What is the ultimate goal? That decision will be made by UNCITRAL, based upon the ITL Study, and it is premature to conclude that a new international convention is in the offing. However, we can

⁷ Including UNCITRAL, ICS, BIMCO, FIATA and IAPH.

reasonably speculate that a new convention will be the long-term goal. I use the qualifier "long-term" advisedly, because (1) except for the Law of the Sea Convention, nothing of comparable scope has ever been attempted. To be effective any convention will have to deal with the entire transport of goods covered by an international transport document (and potentially the responsibilities and liabilities of every party involved from the producer to the ultimate purchaser); it must deal also with form, negotiability and bankability of international transport documents including electronic documents; and deal with the vexed questions of ownership and title to the goods at any given stage of the transport. The development of a viable multimodal convention is child's play in comparison. Another guarantee of long-term development is (2) the diplomatic process itself. Once a draft is delivered to UNCITRAL, there will have to be to be review and debate within the Organization followed by scheduling of and submission to a diplomatic conference, followed in turn by the wait for enough ratifications for entry into force. In short, it is highly doubtful that any maritime lawyer over the age of 35 today will ever handle a case arising under a "United Nations Convention on International Transport Law".

Meanwhile States must fill the gaps in current international law with national legislation, which brings me to the proposed revision of the US Carriage of Goods by Sea Act. The first thing to be said is that the bill proposed by the MLAUS has been redrafted by the staff of the Senate Commerce Committee and the consensus in the MLAUS CoG Committee is that it has been improved in the process. The bill will be introduced in the next session of Congress by Senator Hutchinson of Texas, who has already chaired hearings on the legislation, and passage by Congress will then be hostage only to the fortunes of President Clinton, whose problems appear likely to consume a great deal of congressional time next year. I have no reason to doubt, however, that we will in a few months be referring to "1999 COGSA".

I revert again to the shocking revelation that carriage of goods has not been the primary focus of my legal experience, because I do not feel qualified to embark on a general analysis of the proposed legislation. However, there are a couple of controversial features – still controversial in the US at least – that do bear on my own personal experience, and the first of these is the abolition of the error in navigation defense. That defense died in Hamburg on the morning of Tuesday, 28 March 1978, and I was at the bedside. It passed away in a caucus of the Group B (developed nations) delegations, when the "package deal" on Articles 5, 6, 8 and 26 was being cut with the Group of 77.⁸ The Group B decision to jettison error in navigation in order to preserve the fire defense was heavily influenced by the London insurance market in consultation with the British Government; there was a pause in discussion of Article 5 while the principal spokesman for the British delegation conferred by telephone with his colleagues in Marsham Street, and from the moment of his return to the room I am sure no-one in the Group felt otherwise than that error in navigation was absolutely deceased as a principle of transport law. As to the error in management defense, no serious effort to retain it was made at Hamburg when it became apparent at a very early stage that it was so certainly doomed as to be worthless as a bargaining chip.

For the rest of the world, the most controversial feature of the proposed US legislation is almost certainly the option of either party to force mandatory arbitration in the USA. It was included in order to reverse the effect of the judgement of the Supreme Court in the *SKY REEFER* case,⁹ and I am not going to criticize, praise or otherwise comment upon this provision of the bill as domestic legislation. I will go on record as saying that the philosophy of the provision obviously promotes conflict of laws and can find no home in any future international convention on transport law.

⁸ Introduced that afternoon as Conference Document A/CONF.89/C.1/L.211.

⁹ *Vimar Seguros v. Sky Reefer*, 1995 AMC 1817, 515 US 528 (1995).

It is only fair that the balance of what is said here with respect to the pending US legislation should come from the person most qualified to comment, the Chairman of the CoG Committee of the MLAUS.

It has been my great pleasure to address you, and you may be sure that if I ever have another opportunity it will not be used to announce completion of the work on a new transport law convention.

22 Tulane Maritime Journal 581 (another one as student).

The "nautical fault" debate.

Stanley, Houston Journal of Maritime Law vol 18 at 609
1996. - complete dissection of MLAUS draft of new U.S. COCSA (since re-drafted by US Senate committee re-draft).