CMI QUESTIONNAIRE ON ALL ASPECTS OF TRANSPORT LAW

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REFORM OF THE LAW OF INTERNATIONAL TRANSPORT OF GOODS – TOWARDS HARMONY IN OUR TIME?

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Reform of the law governing the international carriage of goods by sea will be a major focus at the next CMI conference in Singapore in February 2001. It is therefore an apposite subject for discussion at this conference.

The CMI's contribution to the reform project is being carried out under the auspices of the United Nations Commission on International Trade Law ("UNCITRAL"). The two organisations recently met together at a colloquium held on 6 July 2000 at the United Nations Headquarters in New York. That event was held in conjunction with a regular UNCITRAL session, thereby allowing a number of government delegations to participate together with interested groups and individuals from the private sector. Clearly, the hoped-for outcome is that close consultation at all stages will lead to a final instrument which gains widespread international acceptance within a reasonable period of time.

BACKGROUND

On one view at least, the current initiative has its origins in earlier work leading to the UNCITRAL Model Law on Electronic Commerce (as approved by the United Nations General Assembly in December 1996). The CMI assisted UNCITRAL in drafting in articles 16 and 17 of the Model Law which relate to contracts for the carriage of goods and transport documents. During the course of that work it was recognised that, in order to produce appropriate rules in an electronic context, it was necessary to analyse in detail the underlying law and practice applying to paper documents used in the international carriage of goods. That analysis in turn led to the recognition of a need for greater clarity and uniformity in the underlying law and practice itself.

In the report on the work of the 29th Session of UNCITRAL held in May and June 1996, it was noted that existing national laws and international conventions leave significant gaps as regards the functioning of bills of lading and sea waybills, the relation of those documents to

rights and obligations as between the buyer and seller of goods, and the legal position of parties which provide financing. It was therefore suggested that UNCITRAL:

> "... *should include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules in the areas where no such rules [exist].*"

As might be anticipated, various reservations were expressed. It was pointed out that the issues proposed to be covered were numerous and highly complex and would therefore strain the resources of the Commission's Secretariat. It was also said that the continued co-existence of different treaties governing liability in relation to the carriage of goods by sea, and particularly the slow process of adherence to the Hamburg Rules, made it unlikely that a still further treaty would lead to greater harmony of laws. In addition, the point was made that renewed consideration of the liability regime was likely to discourage States from adhering to the Hamburg Rules which it was said would be an unfortunate result.

Putting aside considerations of diplomacy, one possible answer to the last objection might have been that a new initiative is appropriate *precisely because* Hamburg has not been widely adopted and, even by mid 1996, individual States were beginning to go their own way by adopting their own unique liability regimes, thus adding to a growing international diversity. However, that seems not to have been the predominant response at the time. Instead, the response of those favouring a new reform initiative was that review of the liability regime was not the main objective of the suggested work. Rather, what was necessary was to provide modern solutions to issues that either were not adequately dealt with or were not dealt with at all in the existing conventions.

In light of the differing views expressed, UNCITRAL did not immediately include consideration of the suggested issues on its own agenda. Nonetheless, the Commission did decide that its Secretariat should gather information, ideas and opinions as to the problems that arise in practice as well as possible solutions to those problems. The Commission also directed that such information gathering should be broadly based and should involve the various international organisations representing commercial interests involved in the carriage of goods by sea, including particularly the CMI. Following a strong expression of interest on the part of the CMI at the 31st Session of UNCITRAL in 1998, the Commission indicated that it would be happy for the CMI to take the lead and, together with other international bodies, organise further work on the wider issues of transport of goods law first raised in 1996.

THE WORK UNDERTAKEN BY THE CMI

In early 1997, following high level contacts between UNCITRAL and the CMI, a Steering Committee of the CMI's Executive Council was set up to co-ordinate the CMI's response with regard to the project outlined by UNCITRAL the previous year. The Steering Committee issued a report in April 1998 which outlined the steps that should be undertaken by a working group.

An International Working Group was duly established under the chairmanship of Stuart Beare, previously a senior partner of Richards Butler in London.

The Working Group studied the issues outlined in the Steering Committee's report and drew up a lengthy and detailed questionnaire which was sent to all national maritime associations towards the middle of 1999. That questionnaire sought details of existing national law in respect of a wide range of matters connected with the international carriage of goods by sea under bills of lading. A number of responses were received, all or most of which appear to have been prepared with commendable thoroughness. The responses also covered a wide geographical and political spread. In addition to the responses by MLAANZ and by the other major common law jurisdictions, responses were also received from several of the major European civil law jurisdictions (Germany, Italy, The Netherlands and Spain) and from Argentina, Indonesia, Japan and North Korea amongst others.

In November 1999, as the last of the responses to the Working Group's questionnaire were being received, the CMI Executive Council moved to establish an International Subcommittee on Issues of Transport Law. It is that body, again under the chairmanship of Stuart Beare, which is currently taking the initiative forward in preparation for the CMI conference in Singapore next February.

The International Subcommittee's terms of reference are:

> *"To consider in what areas of transport law, not at present governed by international liability regimes, greater international uniformity may be achieved; to prepare the outline of an instrument designed to bring about uniformity of transport law; and thereafter to draft provisions to be incorporated in the proposed instrument including those relating to liability."*

Based on the responses to its questionnaire, the Working Group prepared a list of the six principal topics which it recommended the Subcommittee should address at its first meeting in January this year. Each member of the Working Group has made a particular study of one of those topics and leads discussion on that topic within the Subcommittee as well as preparing summaries of discussion and proposals for consideration at subsequent meetings.

The six principal topics identified by the Working Group as being appropriate for further consideration were:

1. **Inspection of the goods and description of the goods in the transport document'**

   - Must the carrier issue a "transport document" (ie. a bill of lading or a sea waybill)?
   - Must the carrier issue a negotiable transport document if requested to do so by the shipper?
   - What details of the cargo must be shown on the transport document?
   - To what extent is the carrier required to record on the transport document information provided by the shipper and when may the carrier include qualifying clauses?
   - What is the extent of the carrier's obligation to inspect and/or weigh the cargo prior to shipment?
   - How far, and in what circumstances, is the carrier bound by the description of the goods entered on the transport document?

2. **Transport document**

   - Dating of the document:
     - must the document be dated?

- which date (that of taking in charge by the carrier, of loading on board, or of issue of the document itself) should be entered on the document?

- what are the consequences of a false date being indicated?

- Signature of the transport document:

  - what is the effect of a transport document being signed by a person who lacked appropriate authority from the carrier?

  - what means of signature should be considered acceptable?

- Identification of the carrier:

  - what matters should be taken into account in identifying "the carrier" in terms of a particular transport document?

  - where a transport document validly incorporates the terms of a charterparty, what consequence does that have as regards identification of "the carrier"?

3. **Rights of the carrier**

- Payment of freight:

  - when should freight be deemed:

    a. earned;

    b. payable?

  - should freight remain payable (and, if already paid, should it be returned) in circumstances where the cargo is lost prior to arrival at destination?

  - where cargo is delivered short of the stipulated destination, should freight be payable on a pro-rata basis according to the distance travelled?

  - who is liable to pay freight – the shipper, the consignee, intermediate bill of lading holders?

- the extent of the carrier's right to claim a lien (and, if need be, to sell the goods) in respect of unpaid freight, deadfreight, demurrage, damages for detention and general average.

4. **Obligations of:**

- The shipper;
- Intermediate holders of a bill of lading;
- The consignee.

5. **Delivery and receipt of the goods at destination**

- To whom must the carrier deliver the cargo under:
  - a negotiable transport document;
  - a non-negotiable transport document?
- At what point should delivery be deemed to take place?
- What rights should the carrier have where the consignee fails to collect the cargo?
- What rules should apply in circumstances where a negotiable transport document has been issued but that document is unavailable at destination at the time the goods arrive?

6. **Rights of "disposal" of the cargo, ie. rights to:**

   a. **Stop the goods in transit.**

   b. **Direct the carrier to change the place at which delivery is to be made.**

c. **Direct the carrier to deliver the goods to a consignee other than the consignee indicated in the transport document:**

- who has the right of disposal?
- when and on what basis does the right of disposal move from one party to another?
- what proof of identity must the holder of the right produce, and what other conditions must the holder of the right satisfy, in order to exercise the right of disposal?
- who is liable for additional costs arising from exercise of the right?
- against whom can the right of disposal be enforced – the contractual carrier or both the contractual carrier and the actual carrier?

During the course of the International Subcommittee's work, the line-up of topics has changed to some degree. In particular, Topic 4 (covering the obligations of the various parties to the transport movement) is no longer being dealt with as a separate section, the issues arising under that topic having been included in other sections. Furthermore, two new topics have been added. Those topics are:

1. Rules in respect of multimodal transport where part of the overall movement involves international carriage by sea (covering also the situation where there is a single contracting carrier but more than one actual sea carrier).

2. Liability per se.

The issue of carriers' liability requires special mention. For some time prior to the CMI's involvement in the current reform initiative, the matter of differing liability regimes was the subject of work by the CMI's International Subcommittee on the Uniformity of the Law of the Carriage of Goods by Sea under the chairmanship of Professor Francesco Berlingieri. The latter Subcommittee presented a report on its work to the CMI Assembly in May 1999. At that time, the Secretary-General informed the Assembly that further consideration bearing on

issues of liability would continue as part of the overall work of the present International Subcommittee on Issues of Transport Law.

PROGRESS MADE BY THE INTERNATIONAL SUBCOMMITTEE ON ISSUES OF TRANSPORT LAW

The International Subcommittee has now met on three occasions during the course of this year, the 27th and 28th of January, the 6th and 7th of April and the 7th and 8th of July.

Official reports are available only in relation to the first and second of those meetings. However, Tom Broadmore has very helpfully obtained an informal update from Patrick Griggs (the President of the CMI) with respect to the third meeting.

Following discussion at the first two meetings, sufficient progress had been made to enable the preparation of a set of draft provisions and accompanying commentary covering the initial set of topics addressed by the Subcommittee, i.e. those not relating directly to liability or to contracts involving more than one actual carrier or mode of transport Those draft provisions and commentary formed part of the agenda paper for the third meeting. The agenda paper for that meeting also included a series of tentative "propositions" in relation to through carriage and combined transport.

In addition, the agenda paper for the third meeting included a detailed discussion paper on the subject of liability. That discussion paper identified each of the major issues which a complete liability regime is required to address as well as the various permutations found in the existing conventions governing carriage by sea, air, rail and road. The discussion paper went on to record those areas on which there had been general agreement within the Uniformity Subcommittee as well as those areas where a consensus was not apparent.

Turning now to the third meeting of the Subcommittee, Patrick Griggs reports that good progress was made both on issues of liability and in terms of moving towards a set of draft provisions for the proposed Convention as a whole. There was evidently a general mood of optimism amongst the members of the Subcommittee, though it seems that the rules to cover multi-modal transport remain to be tackled and may prove a difficult task.

MLAANZ'S CONTRIBUTION

MLAANZ's principal contribution to the current reform process has been the sending of answers to the detailed questionnaire issued by the CMI Working Group last year. The Association's answer paper was forwarded to Stuart Beare in London on 17 December 1999, in time for its contents to be taken into account in the "Synopsis of Responses" accompanying the very helpful "Introductory Paper" in which Mr Beare invited participation at the first meeting of the International Subcommittee on 27 and 28 January 2000.

The MLAANZ subcommittee which prepared the Association's response to the questionnaire was chaired by Mark Perkins who is a longstanding member of the Association and now a New Zealand District Court Judge. The other members of the subcommittee were:

1. Dr Paul Myburgh of Auckland University;

2. Professor Martin Davies of Melbourne University;

3. John McKelvie, the New Zealand Claims Manager for International Marine Insurance Agency Limited, based in Auckland;

4. The writer.

It must be conceded at once that the MLAANZ response leaned heavily on the very detailed and scholarly response provided by the British Maritime Law Association. This Association's response began by noting that, in the maritime field, Australian and New Zealand common law generally follows English law. The point was also made that, with some notable exceptions, Australia and New Zealand have tended to codify transport law by following corresponding English statutes. At the same time, our response carefully noted those points on which Australian and New Zealand law have developed their own unique solutions. For example, reference was made to New Zealand's Carriage of Goods Act 1979, governing domestic carriage, which applies compulsorily to steps taken before loading and after discharge. Reference was also made to Australia's Carriage of Goods by Sea Act having introduced variations on Hague-Visby with some overlay of the Hamburg Rules and, in particular, providing for an extension to the duration of sea carriers' liability in the case of outwards shipments.

The MLAANZ response also made a request that any draft convention should include a specific article in relation to documentary materials or electronically stored data recording temperature or atmosphere conditions. In particular, it was suggested that the carrier should be required to produce such records forthwith upon reasonable demand by cargo interests. The failure to do so without reasonable explanation would give rise to an inference that the stipulated temperature or atmospheric requirement was not in fact complied with.

The aim of the proposed article would be to ensure that where the health authorities of an importing country have reason to question the quality of temperature or atmosphere controlled goods, records are available at once so as to resolve any issue as to conditions maintained during the voyage. The proposed article would also deal with the situation where computerised data records (in, for example, a refrigerated container) operate over a cycle or have only a limited overall capacity, meaning that data is continually being overwritten and that relevant data may be irretrievably lost before proceedings are commenced.

The MLAANZ response also recognised the practical importance of carriers' temperature and atmosphere control records in a further way. It was suggested that those records should be automatically admissible as *prima facie* evidence of the conditions under which goods have been carried. Similar provisions would apply in the case of recording devices put in place by cargo interests.

THE FUTURE

At this conference 2 years ago Dr Frank Wiswall Jnr, Vice President of the CMI, made the observation:

> *"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"."*

Does that remain a reasonable assessment at the present time? It is still too early to say. However, the degree of progress made over the last 12 months or so does suggest that Dr Wiswall's scepticism may not, in the end, prove well founded.

The present International Subcommittee is due to meet again on 12 and 13 October 2000 in London. If all goes according to plan, at the conclusion of that meeting the Subcommittee

will have produced a complete draft convention and associated commentary ready for discussion at the CMI Conference in Singapore in February next year. Again if all goes according to plan, the draft convention will include provisions covering a number of topics not at the moment the subject of any international convention plus a liability regime which resolves the differences between Hague-Visby and Hamburg and, finally, will set out rules on multimodal transport which have a chance of gaining general international agreement.

Assuming that a full working draft is available for consideration in Singapore, and that conference leads to a draft suitable for delivery to UNCITRAL, there will then need to be review and debate within the latter organisation followed by submission to a diplomatic conference. Provided agreement is also reached at that conference and a convention signed, there will then be a further wait for sufficient ratifications to enable the new convention to enter into force. Nonetheless, if the draft convention now taking shape can be completed with sufficient dexterity, it is just possible, even for those wily old maritime lawyers who have crept over the age of 35, that we might one day before our retirement conduct a carriage of goods case applying the "United Nations Convention on International Transport Law".