UNCITRAL'S DRAFT INSTRUMENT ON THE CARRIAGE OF GOODS BY SEA

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DEVELOPMENTS IN TRANSPORTATION LAW

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[A] Comite Maritime International (CMI)

At the end of last year the Comite Maritime International (CMI) delivered to UNCITRAL (one of the organs of the United Nations) a Draft Instrument on Transport Law. That document had been prepared over a period of 2 years. The CMI International sub-committee on Issues of Transport Law had met in the year 2000 and produced materials for discussion at the February 2001 international conference of CMI at Singapore, which a number of delegates to this conference attended. As a result of decisions taken at the Singapore Conference the sub-committee was able to conclude its work last year and the Executive Council of CMI signed off on its report in December 2001.

The Draft Instrument, now The "Preliminary Draft Instrument on the Carriage of Goods by Sea", was considered at a meeting at New York between 15 and 26 April 2002 of the UNCITRAL Working Group on Transport Law and at the time of writing this paper, in mid September, a further meeting of that working group is taking place in Vienna.

The purpose of this paper is simply to outline some of the principal features of the Draft Instrument and some of the areas which have caused concern.

At the CMI Conference in Singapore there were four papers presented for delegates to consider and debate. (Singapore I) They were:-

A Draft Outline Instrument, a paper entitled "Door to Door Transport", a report entitled "Electronic Commerce Implications of the Outline Instrument" and an "Agenda Paper". Taken from the Report of the Conference (Singapore II) the result of the deliberations in Singapore (in brief) on the following issues was as follows:-

Type of Instrument

There was a clear majority for the view that there should be a Convention. The core provisions should be mandatory. Provisions governing liability on the sea leg of an international transport would clearly be part of this core, but discussion revealed some difficulty in identifying what else should be included in the core provisions.

Period of Responsibility and Door to Door Transport

There was considerable support for extending the period of responsibility to cover inland carriage preceding or subsequent to maritime carriage from the place and point of time where and when the goods are handed over by the shipper to the maritime carrier until the place and point of time where and when the goods are delivered to the consignee. It was also accepted that any formula adopted should permit the period of responsibility to be limited where tackle to tackle or port to port carriage is involved, as is often the case in the bulk trade. Whilst there was some support for a uniform liability regime to cover the carriage proceeding or subsequent to maritime carriage there was greater support for a "network" system of liability because it was more readily achievable, at least in the short run, and it would not be creating inconsistencies with existing unimodal law, such as the CMR Convention.

Through Transport

There was no general support for prohibiting through transport. There was widespread support for the transport documents including safeguards and clearly setting out the limits on the carrier's liability to contract as an agent for the shipper.

Liability

There was overwhelming support for a fault-based regime based on the Hague or Hague-Visby Rules, although there was some support for a regime on the lines of the Hamburg Rules. As to whether the relevant liability

provisions should be of a general nature, as in the Hamburg Rules or more detailed, as in the Hague and Hague-Visby Rules there was greater support for a detailed list of the relevant provisions.

Exemptions

Insofar as exemptions from liability were concerned there was considerable support for eliminating the exemption for errors in the navigation or management of the vessel.

Burden of Proof

In relation to burden of proof the consensus was that it should remain as under the Hague and Hague-Visby Rules.

Performing Carrier's Liability

An issue of some concern to delegates related to the concept of performing carrier in the draft Outline Instrument. There was some support for narrowing the definition of performing carrier.

Delays

There was widespread support for a special provision governing liability for delay when a specific time for delivery had been agreed.

Loss of Right to Limit Liability

There was unanimous support for the draft Outline Instrument's treatment of this question whereby the servant's or agent's actions ("breakable behaviour") generally does not defeat the contracting carrier's right to limit its liability.

Shippers' Responsibilities and Liabilities

There was considerable support for a shipper's liability based on fault and for there being no distinction between inherently dangerous and other cargo. Furthermore there was general support for the view that the liability of the

shipper should not be subject to limitation and that some sort of time bar on claims would be appropriate.

Transport Documents

There was broad support for addressing many of the issues raised in Chapters 10 and 11 of the Draft Outline Instrument, dealing with the right of control and transfer of rights, particularly in view of the E-Commerce implications of the subject, but the draft needed to be re-written with a fresh approach in light of the different views that were expressed by the delegates.

In relation to Cargo Information and Transport Documents there was broad support for the general approach taken in the draft Outline Instrument with respect to the detail of the information which was required in the transport document, the carrier's duty to check and its right to qualify the information, as well as the liability for incorrect information.

Electronic Commerce

There was a consensus that the final instrument must facilitate and be compatible with Electronic Commerce. The provisions covering these aspects needed to be simple and technology-neutral and regard needed to be given to the 1990 CMI Rules on electronic bills of lading.

[B] UNCITRAL and UNECE

Prior to the UNCITRAL Working Group meeting in April 2002 in New York papers were prepared by the United Nations Economic Commission for Europe (UNECE) and the rival United Nations Organ UNCTAD, to which reference needs to be made.

[1] UNECE's comments on the Draft Instrument

This paper noted that the UNECE administers some 50 International Conventions and Agreements in the field of transportation, such as CMR and the International Convention to Facilitate the Crossing of Frontiers for Goods

Carried by Rail. The paper also records the agreement between the UNECE, UNCTAD and UNCITRAL that:

> "possible work on the desirability and feasibility on a new international legal instrument covering door to door issues should be undertaken with the active involvement and substantive contributions of the three United Nations Governmental Organisations".

The paper went on to point out that the Draft Instrument was largely prepared by maritime interests. It noted that:

> "the broad scope of the Instrument may create conflict of conventions in cases where other unimodal conventions address the issue of multi-modal/combined transport as well as in some narrowly defined instances. An example may be the case when a lorry transporting the goods by road is carried over part of the journey by sea, for example, from France to the United Kingdom, and the goods have not been unloaded from the vehicle and the damage has not been localised. In such a situation both CMR and the Instrument are likely to apply. Article 2 of CMR says that CMR applies to the whole carriage in this situation and Chapter 4 of the Instrument requires the Instrument to be mandatorily applicable as long as it cannot be proved where the loss or damage occurred."

This report concluded that it is important:

> "to reconcile, in the longer term, civil liability rules for multi-modal transport in a single regulation, thereby doing away with the present situation of legal uncertainty and forum shopping. Consequently it is necessary to avoid the creation of a number of multi-modal transport regulations which may even overlap."

The UNECE report concluded that UNCITRAL should stick to defining solutions to the port to port regime leaving door to door transportation to further work and consultation.

[2] UNCTAD's comments on the Draft Instrument

The UNCTAD paper noted that this organ of the United Nations was involved in the preparatory work for the Hamburg Rules, the UN Convention on International Multi-modal Transport of Goods 1980, the UNCTAD/ICC Rules for multi-modal transport documents and is currently involved in studying the feasibility of establishing a widely acceptable new international convention on multi-modal transport.

This paper made the same point as the UNECE paper that the Draft Instrument:

> "has been drawn up by representatives of only maritime interests without broad consultation of parties involved with and experienced in the other modes of transportation. As a result, the proposed regime is, in substance, based on maritime concepts and existing maritime liability regimes which puts into question its suitability as a modern legislative framework to regulate liability where contracts involved several modes of transportation (eg. air, road, rail or inland waterway carriage as well as sea-carriage)."

It criticised the substantive liability rules as sacrificing the benefits of certainty associated with the established meaning of provisions and existing regimes. (An interesting observation given that that was the principal criticism made by opponents of the Hamburg Rules for which UNCTAD was responsible). It also suggested that the Draft Instrument adopted a new approach to risk distribution "with a shift in balance favourable to carriers". (I assume the justification for that comment is that it comes from a Hamburg Rules perspective, ignoring the fact that the Hamburg Rules are not in force in any country of any significance in international trade.)

This paper was also critical of the new provisions dealing with freight, right of control, transfer rights and rights of suit simply on the basis that they are not currently regulated in any international convention and the proposed provisions do not appear to be sufficiently clear and uncontroversial to make

their inclusion desirable. The paper was also critical of the structure and drafting of the text.

Turning to the detailed criticism which UNCTAD made: it was critical of the definition of **"Contract of Carriage"** since, as it says:

> "any multi-modal transport document would be subject to the regime if part of the transport were in fact carried out by sea. As a result, most international transport contracts would potentially become subject to a regime which is essentially based on existing maritime concepts and liability regimes and has been drafted by representatives of largely maritime interests without consultation with representatives of the other modes of transport".

The UNCTAD paper was critical of the **period of responsibility** definitions in the draft instrument. (Receipt of the goods until delivery). It suggested that the proper test for the time of commencement should be determined by contractual agreement (failing that: custom, practice or trade usage). Having suggested that, UNCTAD then went on to point out that that may lead carriers to find it attractive "to contract on tackle to tackle terms, so as to minimise their period of contractual responsibility" leading, so it was suggested, to abuse.

In relation to the proposed **network system** which would enable mandatory international conventions applicable to the relevant segment where loss or damage or delay occurs to be given precedence, UNCTAD suggested that this could give rise to considerable uncertainty, because it requires the identification of the stage where the loss or damage occurred and whether in a given jurisdiction any applicable regime applied mandatorily.

UNCTAD was critical of the absence of any particular **delivery** obligation being placed on carriers, and the ability of carriers to "contract out" of some of its obligations under Article 5.2.2 (consistent with UNCTAD's concerns in relation to Article 4.3) by defining such obligations in a narrow way.

It was also critical of the provisions dealing with a carrier's rights where dangerous goods have been shipped as having "no safeguards against unjustified claims or behaviour by the carrier." In relation to Article 5.4, which is the equivalent of Article 111.1. of the Hague Rules, UNCTAD says that it does not impose a burden on the carrier of proving the exercise of due diligence and suggests that a cargo claimant may have to prove an absence of due diligence by the carrier. It is the "complicated amalgamation of the corresponding Hague Visby and Hamburg provisions and some new elements" in the liability provisions which UNCTAD is, not surprisingly, highly critical of. The retention of the exemptions for nautical fault, fire and acts of pilots (it should be noted that they are only retained in parenthesis) also come in for criticism.

UNCTAD was critical of the drafting of the provisions dealing with allocation of responsibility where loss is due to a combination of causes, and is particularly scathing about the second alternative provision in Article 6.1.4.

In relation to the Performing parties liability provisions UNCTAD was critical of the different terminology used to identify the period of their responsibility: contracting carrier: receipt and delivery; performing carrier : custody. It was also critical of the definition of "performing party" and the entities for whose acts or omissions they are responsible, as well as the extension of the carrier's defences and limitations of liability to parties who may not bear any responsibility in any event.

UNCTAD was however supportive of the inclusion of provisions dealing with joint and several liability as well as delay, although expressing reservations about some aspects of the provisions dealing with delay.

In relation to the deck carriage provision it described it as "an extremely complex provision which may lead to confusion", and recommended adoption of the Hamburg text.

UNCTAD suggested that the limitation amounts should be increased substantially beyond those of the Hague Visby Rules, and also beyond the

Hamburg limits, and pointed out that the period of notice for loss or damage corresponds to Hague Visby but is shorter than Hamburg and the recently adopted Budapest Convention on Contracts for the Carriage of Goods by Inland Waterway 2000.

UNCTAD also pointed out that the provisions dealing with the obligations of the shipper are not found in existing maritime liability conventions and the relevant Hamburg provisions should be adopted. It suggested that a consignee might, by reason of a contractual provision in a bill of lading, be deemed to be the shipper for certain purposes and thus have responsibilities and liabilities placed on it by the Draft Instrument.

UNCTAD was of the opinion that the provisions requiring the inclusion of certain particulars in a transport document/electronic record could "severely prejudice the interests of cargo claimants". It was supportive of the requirement that the carrier's name and address be inserted in the bill of lading. It suggested that the date of shipment is a particular which should be included in the bill of lading and the provision dealing with "electronic signature" should reflect that in the UNCITRAL Model Law on Electronic Signatures.

In relation to the provision which establishes a presumption that the registered owner of a vessel carrying the goods is the carrier, which can be displaced where the vessel is under bareboat charter, UNCTAD has queried why the same presumption should not apply to the bareboat charterer.

UNCTAD says that the provisions dealing with freight are not found in any current international regime, deal with a subject which is likely to be variously dealt with in different jurisdictions and seem to favour carriers. As such they should be treated with caution.

It commented on the lien provision to the effect that by making rights dependent on national law provisions it introduces uncertainty. In general it is said that the provisions introduce a "network" approach rather than a "uniform approach".

UNCTAD was also highly critical of the new provisions relating to the obligation of the consignee to "accept delivery of the goods at the time and location mentioned in Article 4.1.3." and considered some of those provisions to be unreasonable and not to strike an appropriate balance between carrier and consignee interests.

Chapters 11, 12 and 13 dealing with right of control, transfer of rights and rights of suit, which are all new to such a regime came in for particular criticism from UNCTAD. It is said that these provisions do not represent international consensus on the concepts used and the rights described. It recommended their deletion. It was critical of the drafting. Concerning the time for suit provisions UNCTAD contrasts the one year (Hague Visby) proposal with the two year Hamburg provisions. It pointed out that the proposed provision does not refer to liability of the "ship" and queried whether actions in rem might not be caught by such a time bar. It also expressed concerns that there may be doubt as to when the period commences (for example in cases of partial delivery) and was critical of the relation back to articles 4.1.3 and 4.1.4 of the Draft which UNCTAD regarded as "unclear and unsatisfactory".

Article 17 is regarded by UNCTAD as "one of the most crucial provisions for consideration, as it defines the mandatory scope of the Draft Instrument". Because it adopts elements of Hague Visby and Hamburg it is said that "established case law on either provisions would be of only limited relevance." It was critical of the fact that the Draft seeks to make the obligations of the shipper (as well as the carrier) mandatory when carriers, more so than shippers (because they are otherwise using their own standard bill of lading terms,) are free to enter an agreement with a shipper pursuant to which its obligations are reduced. UNCTAD does not see any "policy considerations which suggest that interference in the principle of freedom of contract would be justified in this context. Equally there appears to be no convincing reason why a contractual increase of the carrier's liability should not be permissible."

Finally UNCTAD was critical of the inclusion in Article 17 of special provisions permitting the contractual liability by carriers where live animals are carried or "special cargo" which is not carried in the ordinary course of trade is transported, to be excluded.

[C] The CMI commentary on the April meeting in New York of the UNCITRAL Working Group reads as follows:-

"The Working Group commenced its work by a general exchange of views on the following issues:-

(a) Sphere of application;

(b) Electronic communication;

(c) Liability of the carrier;

(d) Rights and obligations of the parties to the contract of carriage;

(e) Right of control;

(f) Transfer of contractual rights and judicial exercise of the rights emanating from the contract;

(g) Freedom of contract.

Generally, the CMI draft was well accepted by the delegates. It was regarded as a useful basis for the forthcoming discussions. Also those subjects that are hardly or not dealt with in the other transport conventions, such as the e-commerce provisions and those on freight, right of control and transfer of rights were welcomed by many delegates as possible enrichments of transport law. Several delegates, however, advised that they were not in a position to express explicit views yet, because the time between their receipt of the Draft Instrument and the date of the session of the Working Group was too short for accomplishment of the consultation process within their countries.

Special attention was devoted to the issue relating to the possible application of the Draft Instrument to door-to-door transport, as suggested in Article 4.2.1. It was pointed out that provisions should be made in the Draft Instrument for the relation between such Instrument and other Conventions governing inland transport in view of the increasing number of contracts of carriage by sea, in particular in the liner trade, of containerised cargo, that included carriage by road or railway before and after the sea leg. After arguments in favour and against the application of the Draft Instrument to door-to-door transport were put forward the Working Group decided that it would be desirable to include within the scope of the discussion also door-to-door operations and to deal with these operations rather than developing a multimodal regime, by developing a regime that resolved any conflict between the Draft Instrument and mandatory provisions of Conventions governing land carriage in cases where the sea carriage was complemented by one or more land carriage.

In connection with the issue relating to the freedom of contract it was pointed out that the exclusion of charter parties, contracts of affreightment, volume contracts and similar agreements from the scope of the application of the instrument would affect Article 17 of the Draft which sets out the limits of contractual freedom. It was noted that Article 3.3 of the Draft went beyond the traditional approach of the exclusion of contracts of affreightment and similar agreements; it was suggested that it would be appropriate for the parties negotiating such agreements to have freedom of contract and to agree to the terms that might apply and, in particular, on the liability provisions that would apply as between themselves. However, concerns were also expressed that, in view of the widespread use of these contracts of affreightment and similar agreement in the container liner trade, this freedom of contract might lead to a general evasion of the Draft Instrument and thus dilute the strength of a new regime.

After completion of the general discussion, a number of individual draft articles were considered. Amongst the definitions contained in Article 1, the definition of "performing party" in Article 1.17 received special attention; it was suggested that it should be preferable to channel the liability on the

contractual carrier and to provide for a right of recourse of the contractual carrier against the performing parties. It was also suggested to further restrict the notion of performing party by excluding entities that handled and stowed goods, such as operators of transport terminals and to include in the definition only those who actually performed carriage operations. However, wide support was expressed for the definition presently appearing in the Draft Instrument.

The Working Group then considered Article 5 of the Draft where the obligations of the carrier are set out. Consideration of Article 7, relating to the obligations of the shipper, followed.

The Working Group subsequently discussed Article 9 on freight, albeit not in full. Further discussion on that article will take place at the tenth session of the Working Group in September 2002 when also other articles of the Draft Instrument will be considered. It must be emphasised that this first reading of the Draft Instrument was used by the Working Group to have a general exchange of view only. No intention was made to agree on any concrete change in the Draft yet.

The report of the Working Group III is presently available on the UNCITRAL website www.uncitral.org."

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