

- **The UNCITRAL Draft
Instrument on Transport
Law – Does Australian
Need It?**

- **Dr Sarah Derrington**
Associate Professor,
TC Beirne School of Law, UQ

Dr. Sarah C. Derrington

B.A. LL.B. LL.M. PhD (Queensland), MCIArb

ASSOCIATE PROFESSOR IN LAW

Barrister of the Supreme Court of Queensland, Barrister and Solicitor of the Australian Capital Territory, Registered Practitioner of the High Court of Australia

Sarah Derrington read for a B.A. in French and German and an LL.B. at the University of Queensland. She pursued post-graduate studies whilst practising as a Solicitor in Canberra and then as a Barrister in Brisbane. She completed her PhD in marine insurance law in 1998 and was appointed to the T C Beirne School of Law at the University of Queensland as a Lecturer in that year. She was promoted to Senior Lecturer in 1999 and to Associate Professor in 2003.

Dr Derrington teaches maritime law at undergraduate and post-graduate level and equity at the University of Queensland. She has been a visiting lecturer to the University of Nottingham since 2002 where she teaches International Carriage of Goods by Sea in the LLM programme. She has published in various journals including Lloyd's Maritime & Commercial Law Quarterly, the Insurance Law Journal, the Journal of Maritime Law and Commerce, the maritime law area of the Laws of Australia and the Butterworths Supreme Court Forms, Precedents and Pleadings and has written a chapter in The Modern Law of Marine Insurance, Vol 2 by D. Rhidian Thomas (LLP, 2002).

Dr Derrington continues to practise at the private Bar, exclusively in shipping law.

THE UNCITRAL DRAFT INSTRUMENT ON TRANSPORT LAW DOES AUSTRALIA NEED IT?

SARAH C DERRINGTON*

In 2001, at its thirty-fourth session, UNCITRAL established Working Group III (Transport Law) and entrusted it with the task of preparing a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, obligations of the shipper and transport documents. In 2002, UNCITRAL approved the working assumption that the draft instrument on transport law should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the working group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context.¹

Currently there are three international conventions relating to the carriage of goods by sea: the Hague Rules (utilised by the US and a few smaller nations), the Hague/Visby Rules (to which over 70 nations, including most of the World's shipping nations, are party), the Hamburg Rules (adopted by 29 nations) and various hybrid versions such as the *Carriage of Goods by Sea Act 1991 (Cth)* (COGSA '91)² and the Chinese Maritime Code. In addition to the regimes relating to maritime transport, are the conventions relating to land transport: the Convention on the Contract for the International Carriage of Goods 1956 (CMR) and the Convention Concerning International Carriage by Rail 1980 (CIM/COTIF). The UN Convention on Multimodal Transportation of Goods 1980, which set out a uniform regime for multimodal transport contracts, has received only 10 ratifications and requires 30 to bring it into force. In light of these various conflicting regimes, it is unsurprising that there is momentum for a uniform regime. However, if greater uniformity is indeed the goal, might it not be preferable simply to amend one of the existing regimes, presumably that which has already achieved the greatest international acceptance, to take account of current concerns with that regime?

The establishment of Working Group III was a response to the work already undertaken by CMI. In May 1998, CMI had decided not to proceed with any attempt to amend the Hague/Visby Rules and instead "to consider areas of transport law not at present governed by international liability regimes". In 1999, it was resolved to add provisions "relating to liability"³. At the Singapore conference in 2001, a draft was considered in the plenary session and, on 10

*Reader in Law, Centre for Maritime Law, T C Beime School of Law, University of Queensland, Barrister-at-Law

¹ CMI Yearbook 2003, 125

² The *Carriage of Goods by Sea Act 1991 (Cth)* was amended by the *Carriage of Goods by Sea Amendment Act 1997 (Cth)* and the *Carriage of Goods by Sea Regulations 1998 (No.2)*. In this paper, the changes which have been made to the Hague/Visby Rules by the amending legislation are referred to as the "modified" Rules

³ CMI Yearbook 2000, 112

December 2001, a Final Draft Instrument on Transport Law was adopted by CMI and delivered to UNCITRAL.

The danger with this present course of action is that yet another regime will be introduced, with yet another liability regime, which will further split the maritime world and which will complicate the resolution of cargo claims. In a note entitled "International Conventions and Commercial Law: The Pursuit of Uniformity"⁴, Mr Justice Hobhouse (as he then was) wrote:⁵

In considering the merit of any convention or draft that is to apply to international commercial activity it could be thought relevant to consider first what are actually the needs of the commercial community. The first and paramount requirement is the achievement of certainty as far as that is possibly. The commercial man needs to be able to obtain prompt and accurate advice about the effect of contracts into which he has entered or is about to enter, or about unusual situations in which he finds himself...it must provide simple and clear rules whereby rights can be expeditiously established and remedies promptly provided.

The Draft Instrument currently runs to 19 Chapters and 89 Articles. This is to be compared with the Hague/Visby Rules' 10 Articles and the 26 Articles of the Hamburg Rules. It is perhaps merely symptomatic of the current trends in legal drafting which are equally apparent in this country⁶. From Australia's point of view, the Draft Instrument needs to be viewed in light of the amendments which were made to COGSA '91 in 1998 and in light of the amendments which were made to the more general principles relating to carriage of goods by the various *Sea-Carriage Documents* Acts in or about 1996.⁷ As the Draft currently stands, with one or two significant caveats, Australia might not be overly affected by its provisions: the changes which it makes to the existing international regimes largely mirror the amendments made to COGSA '91, and thus it might be thought that there could be no real harm in ratifying the convention which eventually results. Conversely, the view might be taken, quite justifiably, that Australia has already addressed the major difficulties with the Hague/Visby regime; that Australian law now strikes a fair balance between cargo interests and carrier interests; that Australian law has a workable system to accommodate the development of e-commerce in the context of carriage of goods by sea; that Australian law relating to the transfer of rights and liabilities pursuant to sea-carriage documents is workable and settled; and that Australia has made appropriate provision for Australian cargo interests to have access to Australian courts and/or arbitration.

⁴ Hobhouse J, *The Pursuit of Uniformity* (1991) 106 LQR 530

⁵ At 532

⁶ In 1973, the Commonwealth Parliament passed 221 statutes; in 1991 204. The 221 statutes took up 1624 pages whilst the 204 statutes passed in 1991 required 6905 pages!

⁷ *Sea-Carriage Documents Act 1996* (Qld); *Sea-Carriage Documents Act 1997* (NSW); *Sea-Carriage Documents Act 1997*(WA); *Sea-Carriage Documents Act 1997* (Tas); *Sea-Carriage Documents Act 1998* (Vic); *Sea-Carriage Documents Act 1998* (SA); *Sea-Carriage Documents Act 1998* (NT)

The aims and objectives of the drafters

It can be inferred from the work done thus far on the Draft Instrument, that there is a real desire amongst those involved at the coalface to harmonise international carriage of goods law and to produce an instrument which will enable that uniform law to apply to the goods from "door-to-door". There is also a slightly cynical view afoot, namely that the real aim of the drafters is to secure in the US an all-encompassing national, network carriage law and that this objective might be achieved if a new international regime, support by the US were accepted.⁸ Behind the cynicism, however, lies the very valid concern that, without US support, a uniform regime will not eventuate and, given the US' history in not adopting international conventions, the whole exercise may well be futile.

A comparison with COGSA '91

The scope of the Draft Instrument

The scope of the Draft Instrument is determined by an examination of the nature of the transactions which will be covered by the Draft Instrument and its geographic reach. Article 1(a) provides

"Contract of Carriage" means a contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly by sea from one place to another.

The intention of this definition was to cover traditional bills of lading and whatever bill-of-lading substitutes might develop in the future. As this definition stands, it is not clear whether the sea leg of the transport must be international. This issue appears to have been resolved in the autumn 2003 meeting in Vienna with most delegations agreeing that the scope of the Instrument should be restricted so that it applied to the door-to-door carriage of goods only when (1) the carriage included a sea leg, and (2) the sea-leg involved international transport.⁹

There is, however, concern that the very broad definition of "contract of carriage" may inadvertently pick up charterparty substitutes. Article 2.3 thus provides

This instrument does not apply to charterparties, [contracts of affreightment, volume contracts, or similar agreements.]¹⁰

One question which is still being debated is how should "charterparty" be defined? The significance of this question prompted a CMI/UNCITRAL Round Table on Freedom of Contract in London in February of this year. Paul Myburgh attended the Round Table on behalf of MLAANZ. In his Report,¹¹ Myburgh details the various drafting proposals put forward in an attempt to clarify and resolve the issue. Three drafting proposals were suggested. The first, which Myburgh considers the best, was that put forward by Professor

⁸ W. Tetley QC, Reform of Carriage of Goods – the UNCITRAL Draft & Senate COGSA'99: "Let's Have a Two-Track Approach", (2003) 28 Tul. Mar. L.J. 1, 35

⁹ Michael F. Sturley, Scope of Coverage under the UNCITRAL Draft Instrument, (2004) 10 *The Journal of International Maritime Law* 138, 154

¹⁰ Wording contained within square brackets in the Draft Instrument is wording which is still a matter of debate.

¹¹ MLAANZ Newsletter, Issue 39, April 2004

Charles Debattista. It provides that the Instrument applies to bills of lading, waybills, electronic bills of lading etc that constitute or evidence a contract of carriage of goods by sea and a receipt for the goods, but excludes charterparties. Such a definition would allow for national extensions to the Instrument on a mandatory or contractual basis to allow the US to extend the application of the Instrument to Ocean Liner Service Agreements (OLSAs). The second and third proposals, put forward by the US and Nordic delegations respectively, attempt a definition, in the case of the US proposal, based on the distinction between the liner trades and the tramp trade and, in the case of the Nordic proposal, between contracts for carriage (and OLSAs) and contracts for hiring capacity. The ongoing debate about the definition of a charterparty really reflects differences of emphasis in the common law and civil systems. The Hague/Visby approach of simply excluding “charterparties” does not seem to have caused any difficulties from an Australian perspective and a more complicated definition is likely to create greater uncertainty.

Article 2(1) provides¹² that the Draft Instrument applies to all contracts of carriage in which the place of receipt and the place of delivery are in different States if

- (a) *the place of receipt specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or*
- (b) *the place of delivery specified either in the contract of carriage or in the contract particulars is located in a contracting State, or*
- (c) *[the actual place of delivery is one of the optional places of delivery specified either in the contract of carriage or in the contract particulars and is located in a Contracting State, or]*
- (d) *[the contract of carriage is entered into in a Contracting State or the contract particulars state that the transport document or electronic record is issued in a Contracting State, or]*
- (e) *The contract of carriage provides that this instrument or the law of any State giving effect to them, is to govern the contract.*

Thus, the Draft Instrument will apply to both inbound and outbound carriage.

COGSA '91 provides¹³ that the “modified” Rules apply to outbound carriage pursuant to a sea-carriage document, to inbound carriage, unless the Hague, Hague/Visby or Hamburg Rules (or a modification thereof) apply by reason of law or agreement, but do not apply to charterparties. A “sea-carriage document” is defined as:¹⁴

- (i) a bill of lading; or
- (ii) a negotiable document of title that is similar to a bill of lading and that contains or evidences a contract of carriage by sea; or
- (iii) a bill of lading that, by law, is not negotiable; or
- (iv) a non-negotiable document (including a consignment note and a document of the kind known as a sea waybill or the kind known

¹² There are three variations to Article 2(1) in the Draft Instrument with slight differences of wording in each variation and a suggestion that the Instrument apply also to carriage by inland waterway before and after the voyage by sea.

¹³ COGSA '91, Schedule 1A, Art 10

¹⁴ COGSA '91, Schedule 1A, Art 1(1)(g)

as a ship's delivery order) that either contains or evidences a contract of carriage of goods by sea.

The very broad definition of "sea-carriage document" in COGSA '91 is consistent with the breadth of coverage envisioned by the Draft Instrument, although the manner of achieving that coverage is slightly different. Consistently with the provisions of the Hague/Visby Rules, Australia has not found it necessary to define a charterparty.

The period of responsibility

The next matter to be considered is the period of responsibility under the proposed regime. In contrast to the Hague/Visby and Hamburg Rules, the coverage of the Draft Instrument is contractual in that it is defined by the contract of carriage itself.¹⁵ Article 7 provides:

(1) Subject to article 9, the responsibility of the carrier for the goods under this instrument covers the period from the time when the carrier or a performing party has received the goods for carriage until the time when the goods are delivered to the consignee.

If the contract covers the land carriage preceding the loading of the vessel and land carriage subsequent to the unloading of the vessel, then the Draft Instrument covers the contract. However, if the contract covers only the maritime leg of a multi-modal movement, then the maritime leg is all that is governed by the Draft Instrument. Further, as is apparent from the definition of "contract of carriage", the Draft Instrument requires there to be a maritime leg.¹⁶ This feature has led to the Instrument being described as a "maritime plus" convention.

Unsurprisingly, concerns have been expressed that the new regime would conflict with the existing unimodal conventions, particularly CMR and CIM/COTIF. The Draft Instrument attempts to deal with these concerns by adopting a limited network system. Pursuant to this system, liability would be based on the relevant unimodal regime when it can be shown that the damage occurred during land transport that would otherwise have been subject to a mandatorily applicable international convention. Article 8 provides:

[1. Where a claim or dispute arises out of loss of or damage to goods or delay occurring solely during either of the following periods:

- (a) from the time of receipt of the goods by the carrier or a performing party to the time of their loading on to the vessel;*
- (b) from the time of their discharge from the vessel to the time of their delivery to the consignee;*

and, at the time of such loss, damage or delay, there are provisions of an international convention [or national law] that

- (i) according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable], and*

¹⁵ Article 2(1), 7

¹⁶ Article 1(a)

- (ii) *make specific provisions for carrier's liability, limitation of liability, or time for suit, and*
 - (iii) *cannot be departed from by private contract either at all or to the detriment of the shipper,*
- such provisions, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this instrument.]*
- [2. The provisions under article 8 shall not affect the application of article 18(2).]*
- [3. Article 8 applies regardless of the national law otherwise applicable to the contract of carriage.]*

Professor Sturley notes that there now seems to be widespread agreement, "perhaps even consensus" among the national delegations that the world had little need for another port-to-port convention and that some sort of door-to-door or even multimodal convention was therefore appropriate.¹⁷

The potential problems created by a door-to-door convention inevitably revolve around the treatment of the liabilities and responsibilities of all those involved in the transport chain. The Draft Instrument deals with this issue through the concept of a "performing party". Article 1(e) provides

"Performing party" means a person other than the carrier that physically performs [or undertakes to perform] any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term "performing party" does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee.

The definition is still controversial. However, Professor Sturley again observes that there appears to be broad support for the US position pursuant to which liability would be determined by the narrow network principle.¹⁸ For inland performing parties there would not be the creation of a new cause of action nor would an existing cause of action be pre-empted. Cargo claimants would be free to sue inland performing parties on exactly the same terms as they currently do under existing law. For *maritime* performing parties, the Draft Instrument would provide for a direct cause of action on its own terms.

To balance the extension of liability to performing parties, there is "automatic" Himalaya protection contained in Article 15.

COGSA '91 provides that the "modified" Rules apply from the time when the carrier begins to be in charge of the goods at the time when the goods are delivered to the carrier within the limits of a port or wharf to the time when the carrier ceases to be in charge of the goods at the time when they are

¹⁷ Michael F. Sturley, *Scope of Coverage under the UNCITRAL Draft Instrument*, (2004) 10 *The Journal of International Maritime Law* 138, 147

¹⁸ Michael F. Sturley, *Scope of Coverage under the UNCITRAL Draft Instrument*, (2004) 10 *The Journal of International Maritime Law* 138, 151

delivered to or placed at the disposal of the consignee within the limits of the port or wharf which is the intended destination of the goods.¹⁹ Thus, the Australian regime is restricted to port-to-port liability. This is one of the most significant distinctions between COGSA'91 and the Draft Instrument. "Performing parties" are seldom subject to the obligations and liabilities of the contractual carrier but, of course, can attempt to avail themselves of the carrier's immunities through Himalaya clauses or the doctrine of sub-bailment on terms.²⁰ The adoption of the terms of the Draft Instrument would have the effect of embracing road and rail carriers within the liability regime. As the Australian law stands, road and rail carriers are able to exempt themselves from liability, subject to the provisions of the *Trade Practices Act 1974* (Cth).²¹ It is difficult to envisage much enthusiasm on the part of road and rail carriers for becoming subject to liabilities from which they can currently exempt themselves.

The operation of the liability regime

Chapter 4 of the Draft Instrument sets out the obligations of the carrier:

Article 10 provides:

The carrier shall, subject to this instrument and in accordance with the terms of the contract of carriage, [properly and carefully] carry the goods to the place of destination and deliver them to the consignee.

Article 11 provides:

1. *The carrier shall during the period of its responsibility as defined in article 7, and subject to article 8, properly and carefully load, handle, stow, carry, kept, care for and discharge the goods.*
2. *[The parties may agree that certain of the functions referred to in paragraph 1 shall be performed by or on behalf of the shipper, the controlling party or the consignee. Such an agreement must be referred to in the contract particulars.]*

Article 13 is headed "Additional obligations applicable to the voyage by sea" and provides:

1. *The carrier shall be bound, before, at the beginning of, [and during] the voyage by sea, to exercise due diligence to:*
 - (a) *make [and keep] the ship seaworthy;*
 - (b) *properly man, equip and supply the ship;*
 - (c) *make [and keep] the holds and all other parts of the ship in which the goods are carried, including containers where supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.*

The breach of any of these obligations, which causes loss of or damage to the cargo, or delay in delivery, gives rise to the liability of the carrier. Professor

¹⁹ COGSA '91, Schedule 1A, Art 2(1), Art 1(1)(e), (3)

²⁰ *Brambles Holdings Ltd v WMC Engineering Services Pty Ltd* (1995) 14 WAR 239; [1999] WASCA 1010

²¹ *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1993-4) 179 CLR 388

Philippe Delebecque describes the operation of the liability regime as “an authentic tennis game”:²²

1. Article 14 provides²³ that the carrier is liable in the case of loss, damage or delay if the claimant proves that the occurrence that caused the loss took place during the carrier’s period of responsibility;
2. The carrier can, however, avoid liability by proving that neither its fault (nor that of any performing party) caused or contributed to the loss, damage or delay.
3. It will be presumed that the loss, damage or delay was not caused by the carrier or a performing party if the carrier proves
 - a. that it properly and carefully loaded, handled, stowed, carried, kept cared for and discharged the goods and exercised due diligence before, at the beginning of [and during] the voyage to make [and keep] the ship seaworthy; properly man, equip and supply the ship; make [and keep] the holds...fit and safe...
 - b. that the loss, damage or delay was caused [solely] by one of the following events
 - i. [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions
 - ii. quarantine restrictions; interference by or impediments created by governments, public authorities, rulers or people [including interference by or pursuant to legal process]
 - iii. act or omission of the shipper, the controlling party or the consignee
 - iv. strikes, lockouts, stoppages or restraints of labour
 - v. wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods
 - vi. insufficiency or defective condition of packing or marking
 - vii. latent defects not discoverable by due diligence
 - viii. handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee
 - ix. acts of the carrier or a performing party in pursuance of the powers conferred by article 12 and 13 (2) when the goods have become a danger to persons, property or the environment or have been sacrificed
4. the cargo claimant can attempt to prove that the carrier or performing party committed a fault that caused or contributed to the loss, damage or delay or if it is established that the loss was caused by an occurrence that is not included on the exception list or by an occurrence not relied on by the carrier.

The “authentic tennis game” is relatively easy to follow – until one discovers the drafting peculiarities employed in the Instrument. Chapter 5 is headed

²² Professor Philippe Delebecque, The UNCITRAL Draft Instrument on the Carriage of Goods by Sea, CMI Yearbook 2003, 208, 221

²³ There are three variations to the wording of Article 14 in the Draft Instrument. The wording set out in this paper is Variant A.

“Liability of the Carrier”. It deals with the basis of liability,²⁴ the liability of performing parties,²⁵ delay,²⁶ calculation of compensation,²⁷ limits of liability,²⁸ loss of the right to limit,²⁹ notice of loss, damage or delay³⁰ and non-contractual claims³¹. One then discovers Chapter 6, which is headed “Additional Provisions Relating to Carriage by Sea [or by Other Navigable Waters]. It is in this Chapter that one finds those matters which might have been expected to have been included in the list of exceptions in Article 14. Article 22 provides:³²

1. *[Notwithstanding the provisions of article 14(1) the carrier shall not be liable for loss, damage or delay arising or resulting from fire on the ship, unless caused by the fault or privity of the carrier.]*
2. *Article 14 shall also apply in the case of the following events:*
 - (a) saving or attempting to save life or property at sea; and*
 - [(b) perils, dangers and accidents of the sea or other navigable waters.]*

Chapter 6 also contains articles dealing with deviation³³ and deck cargo.³⁴

The most obvious difference between the provisions of the Draft Instrument and those contained in COGSA '91 is that the traditional list of exceptions contained in Article 4(2) of the Hague/Visby Rules has been recast as a list of presumptions. It is suggested that whether the “excepted perils” are drafted as exceptions or as presumptions makes virtually no difference in practice since the exceptions would still be subject to proof of the carrier’s fault. Is there then any real difference in the way the tennis game would be played pursuant to the rules of the Draft Instrument? Under the Hague/Visby regime:

1. the carrier is required to comply with its obligations contained in Article 3(1) and (2) and will be liable for loss or damage occurring to the cargo during its period of responsibility
2. the carrier will be exempted from liability if it can establish that it complied with its obligations contained in Article 3(1) and that the loss or damage resulted from one of the exceptions listed in Article 4(2).

The Draft Instrument has not deviated too far from the familiar Hague/Visby formula and, this, it is suggested, is its weakness. The wording is more complicated and the subtle shifts in the distribution of the burden of proof and the interaction of the particular obligations and presumptions have not clarified the legal positions of the carrier and the shipper. The burden of proving the

²⁴ Article 14

²⁵ Article 15

²⁶ Article 16

²⁷ Article 17

²⁸ Article 18

²⁹ Article 19

³⁰ Article 20

³¹ Article 21

³² There are two variations to the wording of Article 22 in the Draft Instrument. This wording is Variant A

³³ Article 23

³⁴ Article 24

exercise of due diligence remains on the carrier, although that burden has been extended to the duration of the sea voyage. The burden of proof has however shifted in relation to the exceptions and the claimant now bears the onus of proving that the carrier's fault caused or contributed³⁵ to the loss. A notable omission from the list of matters for which the carrier is presumed not to be liable is the nautical fault defence.

There has, as yet, been no discussion about the proposed limitation amount in the Draft Instrument. It is suggested that the figure settled upon will be crucial to the success of the Instrument. Australia did not tamper with the package and kilo limitations in making its amendments to COGSA '91, but rather has maintained the Hague/Visby amounts. Professor Philippe Delebecque observes that the American statistics, produced for the International Working Group, show that 75.4% of the containerised shipments that reached US ports in 2002 were less than 2 SDR in value.³⁶ Whilst these statistics are limited, any repetition of such findings in the European context would suggest that there is in fact no urgency to review the package and kilo limitations. In addition, there is no attempt to deal with limitation of liability in relation to modern containerised cargo. Even at the time of the amendments to the Hague Rules, the provisions dealing with containerised cargo were already considered out of date. The recent decision of the Full Federal Court in *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA*,³⁷ illustrates the difficulty of applying the antiquated "package limitation" to a containerised cargo. As Jock Mawson, Vice-President of CP Ships (UK) Ltd, wrote in January this year, "History will not judge us kindly if the international shipping community, when undertaking the most significant revision of its rules for carriage in 80 years, adopts by default a method of calculating limitation which wholly ignores the practical realities of modern shipping and the single most important system of carriage; the container".

Provisions relating to e-communication

Chapter 2 of the Draft Instrument makes provision for electronic communication. It provides, essentially, that anything required to be done by or provided in a transport document can be done by electronic means. Chapter 8 deals generally with the requirements of transport documents, such as the contract particulars,³⁸ signature,³⁹ evidentiary effect,⁴⁰ and extends the principles relevant to paper documents to electronic communications.

COGSA '91 also makes provision for electronic communication. It inserted a new Article 1A within the "modified" Rules which provides that the Rules apply, with any necessary changes, to a sea carriage document in the form of a data

³⁵ Article 14(3) provides: *If loss, or damage or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, the carrier is liable for all the loss, damage or delay in delivery except to the extent that it proves that a specified part of the loss was caused by an event for which it is not liable.*

³⁶ Professor Philippe Delebecque, The UNCITRAL Draft Instrument on the Carriage of Goods by Sea, CMI Yearbook 2003, 208, 224

³⁷ [2004] FCAFC 202, 10 August 2004

³⁸ Article 34

³⁹ Article 35

⁴⁰ Articles 39 & 40

message⁴¹ in the same way as they apply to such a document in a printed form.

Transfer of Rights & Rights of Suit

Chapter 12 of the Draft Instrument makes provision for the transfer of rights by the holder of a negotiable transport document, be it paper or electronic.⁴² The basis on which there is a consequent transfer of liabilities is similar to that contained in the *Sea-Carriage Documents Acts*,⁴³ namely, that the transfer of liabilities depends upon the exercise of any right under the contract the carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable document.⁴⁴ If no negotiable document has been issued, the transfer of rights depends upon the provisions of the applicable law⁴⁵ but the transfer does not relieve the transferor of any liability without the consent of the carrier.⁴⁶

Article 63,⁴⁷ contained in Chapter 13, provides

Without prejudice to articles 64 and 65, rights under the contract of carriage may be asserted against the carrier or a performing party only by:

- (a) the shipper*
- (b) the consignee*
- (c) any third party to which the shipper or the consignee has transferred its rights, depending on which of the above parties suffered the loss or damage in consequence of a breach of the contract of carriage,*
- (d) any third party that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer.*

In case of any passing of rights of suit through assignment or subrogation as referred to above, the carrier and the performing party are entitled to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this instrument.

In the Australian context, transfer of rights is dealt with by the *Sea-Carriage Documents Acts* which provide that all rights under a contract of carriage to which the sea carriage document relates are transferred to each successive lawful holder of a bill of lading; in the case of a sea waybill, to the person to

⁴¹ COGSA '91, Schedule 1A, Article 1(ba) "Data message" means information generated, stored or communicated by electronic, optical or analogous means (including electronic interchange, electronic mail, telegram, telex or telecopy) even if the information is never reproduced in printed form.

⁴² Article 59

⁴³ Above note 7; *Sea-Carriage Documents Act 1996 (Qld)*, s.4 extends the Act, with all necessary changes, to sea-carriage documents or the communication of sea carriage documents in the form of, or by means of, data messages.

⁴⁴ Article 60

⁴⁵ Article 61

⁴⁶ Article 62

⁴⁷ A very much simplified form of wording appears as Variant B in the Draft Instrument.

whom delivery of the goods is to be made in accordance with the contract of carriage; and, in the case of a ship's delivery order, to the person to whom delivery of the goods is to be made in accordance with the order. Under general law, a person can exercise rights acquired through subrogation and there is no need for a specific statutory provision.

Jurisdiction and Arbitration

Pursuant to Article 72 of the Draft Instrument,⁴⁸ action may be instituted in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situate in one of the following places:

- (a) Principal place of business or habitual residence of the defendant; or
- (b) [The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or]
- (c) The place of receipt or the place of delivery; or
- (d) Any additional place designated for that purpose in the transport document or electronic record.

In addition, an action may be commenced in the courts of any State Party where the vessel, or any surrogate, has been arrested.⁴⁹ The parties are also able to agree to commence proceedings in the courts of any place after a claim under the contract of carriage has arisen.⁵⁰

Chapter 16⁵¹ deals with arbitration. Article 76 provides that the parties may agree to arbitration but an arbitration clause must be contained in the transport document or be expressly incorporated therein by reference.⁵² At the option of the claimant, proceedings can be commenced in one of the following places

- (a) A place in a State within whose territory is situated
 - (i) principal place of business or habitual residence of the defendant; or
 - (ii) [The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or]
 - (iii) The place of receipt or the place of delivery; or
- (b) Any other place designated for that purpose in the arbitration clause or agreement.⁵³

Despite these provisions, it is open to the parties, after the claim relating to the contract of carriage has arisen, to agree to arbitrate, presumably in any place of the parties' choice.⁵⁴

⁴⁸ There are two variants of Chapter 15 "Jurisdiction" contained in the Draft Instrument

⁴⁹ Article 73

⁵⁰ Article 75*bis*

⁵¹ There are also two variants of Chapter 16 contained in the Draft Instrument

⁵² Article 77

⁵³ Article 78

⁵⁴ Article 80*bis*

The effect of these provisions is that parties to bills of lading, or any other transport document, will be able to agree to litigate or arbitrate in the country of their choice after a claim has already arisen but will otherwise be bound to commence litigation or arbitration in accordance with the choice contained in the transport document, or a place mentioned in the Instrument. Such a position is supported by the UK delegation. Thus, some of the impact of COGSA'91 in preserving maritime litigation and arbitration in Australia would be negated.

COGSA'91 provides that all parties to a sea carriage document (or non-negotiable document) relating to the carriage of goods from any place in Australia to any place outside Australia are taken to have contracted according to the law in force at the place of shipment,⁵⁵ viz, Australia. An agreement which purports to limit the choice of law in relation to outbound shipments or the jurisdiction of an Australian court in relation to both outbound and inbound shipments is of no effect,⁵⁶ unless it is an agreement which provides for an arbitration to be conducted in Australia.⁵⁷

Does Australia need the UNCITRAL Draft Instrument?

This paper commenced with the question whether, in the hope of uniformity, it might not be preferable simply to amend the Hague/Visby Rules to take account of current concerns with that regime. Professor Tetley has identified two, possibly three, matters which require urgent amendment.⁵⁸

1. adoption of realistic package and kilo limitations
2. fair jurisdiction and arbitration clauses
3. perhaps, definition of actual and performing carrier and port-to-port scope of liability.

As has been addressed above, the first matter may, in fact, not be quite so controversial. UNCITRAL may discover that, on average, the package and kilo limitations are realistic. The lack of enthusiasm for the Hamburg Rules also suggests that there is little real pressure being put on States to reconsider the limits. Australia chose not to increase the limits in 1998.

The question of fair jurisdiction and arbitration clauses has, it is suggested, been resolved in Australia by the amendments to COGSA '91. A similar approach has been adopted in Canada, China, Denmark, Finland, France, India, New Zealand, Norway, South Africa, Sweden and Venezuela.⁵⁹ The Draft Instrument would be a backward step for cargo interests.

Again, Australia has already extended the liability of the carrier port-to-port. This is, of course, not as far as the Draft Instrument would take the matter but, in practical terms, it may be far enough. From a European, Canadian and

⁵⁵ COGSA '91 s.10(1)

⁵⁶ COGSA '91 s.10(2)

⁵⁷ COGSA '91 s.10(3)

⁵⁸ W. Tetley QC, Reform of Carriage of Goods – the UNCITRAL Draft & Senate COGSA'99: "Let's Have a Two-Track Approach", (2003) 28 Tul. Mar. L.J. 1, 6 & 18

⁵⁹ W. Tetley QC, Reform of Carriage of Goods – the UNCITRAL Draft & Senate COGSA'99: "Let's Have a Two-Track Approach", (2003) 28 Tul. Mar. L.J. 1, 6-7

perhaps even US perspective, the effect of the limited network regime adopted in the Draft Instrument is likely to be that the Instrument will apply most often to the maritime leg of the voyage in any event, leaving the mandatory inland conventions (CMR, CIM/COTIF) or mandatory national law to apply to the non sea-leg. Indeed, it would appear that the Draft Instrument will be without effect door-to-door in the many countries of Europe and beyond in which these conventions applies.⁶⁰ This view has been reinforced by the interpretation given to Article 1(1) of the CMR by the English Court of Appeal in *Quantum Corp Inc v Plane Trucking Ltd*,⁶¹ viz, that the liability regime of the CMR applies from the time when the goods are “taken over” and that the place of taking over and delivery of the goods under Article 1(1) are to be read as referring to the start and end of the contractually provided for or permitted road leg. Given that Australia does not have the complicating factor of being a party to CMR or CIM/COTIF, the question must become whether there is any benefit at all in applying the Instrument to Australian in-land carriers? US rail and road interests have strenuously opposed such an extension in the US. It is inconceivable that Australian road and rail interests would be any more enamoured of the proposal.

Finally, Australian law has been sufficiently modernised in the past eight years to accommodate e-commerce and the *Sea-Carriage Documents* Acts have addressed the previous deficiencies in the law relating to the transfer of rights and liabilities pursuant to sea-carriage documents.

In speaking of conventions and draft texts, Mr Justice Hobhouse also observed:⁶²

The texts themselves often represent masterpieces of diplomatic negotiation and draftsmanship. They represent a prodigious investment on the part of many lawyers of the highest international reputation...[they] are inevitable and confessedly drafted as multi-cultural compromises between different schemes of law. Consequently they will normally have less merit than most of the individual legal systems from which they have been derived. They lack coherence and consistency. They create problems about their scope. They introduce uncertainty where no uncertainty existed before. They probably deprive the law of those very features which enable it to be an effective tool for the use of international commerce.

Unless there is overwhelming international adoption of the text, my answer is “No”.

⁶⁰ Professor M Clarke, *The Line in between Land and Sea*, [2003] JBL 522, 524

⁶¹ [2002] 2 Lloyd's Rep 25

⁶² Hobhouse J, *The Pursuit of Uniformity* (1991) 106 LQR 530, 531 & 533