UNCITRAL

Susan Downing
Legal Officer
Office of International Law
(Attorney General's Department)

Neil Kelso
Registrar of Liner Shipping
Department of Transport
&
Regional Services

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UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly][by sea]

By

Neil Kelso and Susan Downing

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1. INTRODUCTION

The 18th session of the United Nations Commission on International Trade Law ("UNCITRAL") Working Group III on Transport Law ("the Working Group") met in New York from 3-13 April 2006. Mr Scobie Mackay of the Attorney-General's Department and Mr Neil Kelso of the Department of Transport and Regional Services were the Australian delegates at that meeting.

The Working Group is currently considering a Draft Convention on the Carriage of Goods [wholly or partly][by sea]. The aim of the Draft Convention is to replace existing international regimes such as the Hague Rules, the Hague-Visby Protocol and the Hamburg Rules. The Working Group has been meeting twice a year since 2002 to discuss the text of the Draft Convention with the aim of finalising the text by the end of 2007.

The Department of Transport and Regional Services administers Australia's current marine cargo liability regime, the *Carriage of Goods by Sea Act 1991* ("the COGSA") and is responsible for policy advice on these issues. The Attorney-General's Department is responsible for representation at UNCITRAL and the Office of International Law is responsible for advice on the development and implementation of international law.

2. BACKGROUND ON CARGO LIABILITY REGIMES INCLUDING COGSA

Historically maritime law made the shipowner liable for cargo loss or damage during the voyage except where the losses were caused by an Act of God, public enemies or the inherent vice of the goods (except where negligent or bad faith). There was an implied obligation of seaworthiness.

During the 19th century shipowners gradually moved to a greater and greater use of the freedom of contract to reduce their liabilities for cargo loss or damage. Shipowners grew to be quite ruthless, entering into contracts to exclude liability, until they were often doing so when the loss was due to their own negligence or that of their servants or agents. Liability was even excluded when the loss or damage was caused by the unseaworthiness of the vessel.

The USA was the first country to respond to this trend by introducing the Harter Act in 1893,which introduced a mandatory liability regime in respect of all trade with the

USA. The Harter Act formed the basis for the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("the Hague Rules") done in Brussels in 1924.

The Hague Rules made the carrier liable for faults in the care and custody of cargo, but not for faults in the navigation and management of the ship. The major proportion of the risk in regard to cargo loss or damage remained with the shipper and their insurer. Australia implemented the Hague Rules in the *Sea-Carriage of Goods Act 1924*.

The Hague-Visby (1968) and SDR (Special Drawing Rights) (1979) Protocols were developed to amend liability limits and to redefine the package or unit to which the limits apply, but they do not alter the inherent balance of liability of the Hague Rules. Australia's COGSA gave effect to the Hague Rules as amended by the Hague-Visby Protocol and the SDR Protocol.

The United Nations Convention on the Carriage of Goods by Sea 1978 ("the Hamburg Rules") was the next attempt by the international community to produce a cargo liability convention. The Hamburg Rules markedly shifted the balance of liability towards the carrier and, as a result, they have not been adopted by major trading nations. Other perceived problems with the Hamburg Rules include the jurisdiction and arbitration provisions, the coverage of live animals and the increased limits of liability.

Australia signed the Hamburg Rules and included a mechanism for the future implementation of them in the COGSA. However, after the Cargo Liability Working Group process in 1995, the so-called "Hamburg Rules trigger" was removed in 1997 and the Australian regime was customised in 1997 and 1998 (by Regulations). This involved, for example, broadening the range of sea carriage documents and electronic documents covered by the COGSA, providing for arbitration in Australia, and introducing limited carrier liability for delay.

Efficiency versus equity

The Australian approach to cargo liability is premised on considerations of efficiency rather than equity. Australia accepts the view that the function of a cargo liability regime is to allocate financial risk between the carrier and the cargo interests in an economically efficient manner and to promote uniformity of application.

One argument is that increased carrier liability will lead to a higher standard of care of cargoes by ship operators. However, the counter argument is that put by Lord Diplock:

> "*... taking precautions costs money, which is included in the cost of transport... That expenditure is unproductive to the extent that it exceeds the cost of any loss or diminution of value of the goods in transit which would have occurred if the precautions had not been taken. The economic aim of any law relating to the contract of carriage should be to encourage custodians of goods in transit to take those precautions, and no more, which on this basis are economically productive.*"

Therefore, the carrier should be given just sufficient liability to give them an incentive to care for the goods but not so much as to effectively make them (through a P&I club) the insurer of the goods. In other words, a cargo liability regime is a way of apportioning risk between insurers.

The question of the limitation of liability is not so much a matter of justice or equity, but rather it is a rule of public policy aimed at promoting international trade.

3. BACKGROUND ON THE UNCITRAL & CMI PROCESSES

In 1996, UNCITRAL considered a proposal for 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 where no such rules existed and with a view to achieving greater uniformity of laws. UNCITRAL had been informed by industry that existing national laws and international conventions had left significant gaps regarding various issues. These gaps included the functioning of a bill of lading and a seaway bill, the relationship of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provide financing to a party to a contract of carriage. These gaps in the law constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication on the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and also created the need for uniform provisions addressing the issues particular to the use of new technologies.

The Comité Maritime International (CMI) provided assistance to UNCITRAL by undertaking to prepare a text that might find universal acceptance. The CMI initially prepared a study to identify areas where unification or harmonization of the law was needed by industry. This was achieved by sending a questionnaire to all CMI member organizations, collating the replies and creating an international subcommittee to analyse the data. Following this process, an UNCITRAL/CMI transport law colloquium was held in New York in 2000 to gather ideas and expert opinions on problems that arose in the international carriage of goods by sea. At the colloquium, a majority of speakers acknowledged that existing national laws and international conventions left significant gaps which caused problems for international trade. There was general consensus that, with multimodalism and the use of electronic commerce, international transport law was in need of reform.

In 2001, UNCITRAL established Working Group III on Transport Law and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods by sea. These issues included the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.

4. OUTLINE OF THE DRAFT INSTRUMENT AND APPROACH

The draft instrument is a much longer and more complex instrument than existing cargo liability conventions. The draft instrument covers a broad range of issues in

international transport law (including delivery to the consignee, the right of control of parties interested in the cargo during carriage and the transfer of rights in goods).

Initially UNCITRAL decided that the draft instrument should cover port-to-port transport operations. In 2002 the Working Group widened discussion on the scope of application to include door-to-door transport, in cases where the sea carriage was complemented by one or more land carriage segments. In 2003 the Working Group reached a view that a door-to-door instrument might be achieved by a compromise based on uniform liability, choice of forum and negotiated contracts, which would not deal with actions against performing inland parties (eg road and rail transporters that were operating outside the port area).

Nautical fault defence

Early in the negotiations, the Working Group took the decision to eliminate the "nautical fault defence" which had previously been an exception to carrier liability for loss or damage. However, in the current text carriers are still excused, when the loss of, damage to or delay of the cargo is due to "Perils, dangers and accidents of the sea or other navigable waters". This approach received widespread support in the Working Group.[1]

Scope of Application and Freedom of contract

The new draft instrument, like existing cargo liability regimes, does not purport to cover most bulk cargoes which are carried under charterparties or contracts of affreightment (although many charterparties include the Hague or Hague-Visby Rules in the contract terms). It was decided to delete a provision dealing with the incorporation of the convention as a term of contracts of carriage because of the potential for creating conflicts with the many procedural rules in the draft convention in the chapters on jurisdiction and arbitration.

Another topic of extensive discussion was the extension of the scope of the convention to provide protection to, and impose responsibilities and liabilities on, third parties, such as the holder of a negotiable transport document (which is a document of title) or the person deemed to be the shipper under the rules of the convention regarding the right of control and transfer of that right from one party to another. It was decided to adopt an updated version of Article 10 dealing with this subject.

A new provision was inserted in Article 20 (which deals with the liability of maritime performing parties – the actual carriers as opposed to the contracting carriers) in order to avoid applying the convention in cases where carriage was between States that were not parties to the convention but where cargo was transhipped in a country that was a party to the convention.

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[1] In the 1995 Cargo Liability Working Group process it was then agreed that, providing there is clear international support for such a move by Australia's major trading partners, Australia should support the abolition or partial abolition of the nautical fault defence, at least in respect of act, neglect or default in the management of the ship as a basis for an exemption from liability.

The US led support for a freedom of contract approach means the proposed convention would potentially cover only a minor fraction of sea cargoes. Under the new instrument, derogations from its provisions can be made in respect of any non-bulk/general cargoes carried under "volume contracts" covering multiple shipments.

Some delegates expressed the view that the volume contract exception was unacceptable because shipping lines would simply structure their dealings with shippers to ensure that almost all liner cargo would be carried under volume contracts and therefore would not be covered by the instrument. The risk was that shippers would accept a new form of contract either in return for a slightly lower freight rate or because they lacked the market power to negotiate more favourable terms and by doing so they would in effect sign away rights to compensation from the carriers. It was feared that this could become the norm in liner shipping.

Although concerns were expressed about it being inconsistent to have a broad freedom to derogate from a mandatory regime, overall there was strong support for the volume contract approach taken in the convention. A list of non-derogable provisions, mostly safety or public policy-related, was agreed.

The right of a contract of carriage to exclude liability in the carriage of live animals was maintained, although drafting changes are still to be made. This is compatible with the Australian position that live animals should be outside the scope of the convention (as is the case with the COGSA).

Electronic commerce

A joint meeting of electronic commerce experts from UNCITRAL Working Group III and the UNCITRAL working group on Electronic Commerce was held in London in February 2005, and Working Group III considered recommendations for revising the existing draft provisions on electronic commerce. There was considerable discussion on both technical and drafting issues, the most significant of which appeared to be the need to modify the text to take account of registry systems, in which electronic records are not transferred between the parties to a transaction, but only the rights associated with such records.

As Australia's electronic commerce laws were based on the UNCITRAL model laws, Australia expressed concerns that the draft electronic commerce provisions did not appear to be based on existing UNCITRAL models and that the proposed approach could cause conflicts with national/State law, especially with regard to electronic signatures. This general view was shared by a number of other delegations and the text will be amended accordingly. A proposal that the draft instrument should contain a broad functional definition of an electronic signature and that standards should be left to national law gained considerable support.

Shipper's liability for delay

The question of the shipper's liability for damages for delay caused to the carrier provoked lively and extensive discussion. A special meeting failed to resolve the

issues and the Working Group will need to address this issue at the November meeting.

Carrier interests argued that to balance carrier liability for losses to the shipper or consignee caused by delays in the delivery of cargo (Article 22) there needed to be parallel provisions covering delays caused by the shipper. Although carrier liability for delay is proposed to be limited to the amount of freight paid[2], no formula was suggested for capping shipper liability for delay. As consequential damages for delaying a liner operation could be quite substantial, one delegation proposed deleting Article 22 (carrier liability for delay) as well as the provisions on shipper liability for delay.

It is arguable that there is no need for parallel provisions for shipper liability for delay. Arguably, there is an in-built balance in Article 22. That is, the carrier gains the considerable benefit of limiting its liability (that applies under all forms of legal action: tort, contract, bailment etc) in return for accepting some liability.

Other

The draft instrument provides exclusions in special circumstances (ie not for ordinary commercial shipments). This basically continues the Hague and Hague-Visby approach and received general support in the Working Group.

5. OUTSTANDING ISSUES REGARDING THE DRAFT INSTRUMENT

Much of the remaining work on the draft instrument is fairly technical although there are some issues that remain very controversial. Issues to be dealt at the next session in Vienna (6-17 November 2006) are:

- Jurisdiction and arbitration;
- Transport documents and electronic transport records (a continuation of previous discussions);
- Limitation of liability, including draft article 104 on amendment of limitation amounts;
- Delay and outstanding matters regarding shipper's obligations (also a continuation of previous discussions);
- Rights of suit and time for suit;
- List of potential topics to be deferred for future consideration in another instrument, such as a model law; and
- Final clauses, including relationship with other conventions and general average.

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[2] Currently less than the 2.5 times freight paid in the Australian COGSA and under the Hamburg Rules.

The way in which the proposed instrument will end up dealing with liability for loss or damage incurred during the inland leg associated with international sea carriage is not totally clear at this stage, as the title of the draft instrument still has square brackets around the words [wholly] and [partly] before the word sea.

However, it seems clear that liability under the proposed instrument will be limited to the contracting carrier and maritime performing parties (ones that subcontract to the contracting carrier for elements of the sea carriage or movements within a port). Following changes made to the text in 2004, it is likely that the draft instrument will not apply beyond port limits or to non-maritime performing parties (ie inland carriers). This would avoid many of the difficulties associated with getting differing national laws on inland transport (and in Australia's case, State laws), to comply with the draft instrument. The discrepancy between the proposed liability of maritime performing parties and non-maritime performing parties may well lead to renewed pressure on the Australian Government to remove the *Trade Practices Act 1974* exemption from implied warranties of skill and care that currently applies to commercial land transport in Australia.

Deletions from the convention

Although in New York in April 2006 the Chair expressed satisfaction with progress made towards finalising the text of the draft Instrument, it was becoming apparent that the intended completion date (completion of a final reading by the end of 2007) could not be achieved without cutting back the range of provisions originally intended to be dealt with in the draft instrument.

It was agreed in New York 2006 that certain non-core topics should be removed for consideration in the draft instrument "for the time being", in the interests of meeting the most recent timeframe set by UNCITRAL (end 2007). These issues were likely to be complex and difficult to resolve, and might be best left to an UNCITRAL model law. Examples given were: the right of retention of goods by the carrier; liens; the position of third parties to the contract of carriage; and transfer of liabilities. Inter-sessional consideration may lead to further suggestions for topics that might be deferred.

Delegates were to give inter-sessional consideration to provisions that could be left to be dealt with by an UNCITRAL model law that is under development. Likely candidates for deletion are those provisions not in existing cargo liability conventions, and that thus deal with matters presently dealt with by national law.

6. OTHER ISSUES FOR AUSTRALIA IN ADOPTING THE DRAFT INSTRUMENT

Apart from the exclusive jurisdiction issue set out previously, the major issue for Australia at present is the wide scope for parties to derogate from the provisions of the proposed convention. Allowing parties to derogate from the draft instrument will undermine the uniformity of the proposed regime and yet achieving a uniform international law was one of the main aims of industry at the outset of the process.

Scope for derogation

Under the current approach the draft instrument provides wide scope for derogations from its provisions, through special rules for "volume contracts". Accordingly, a large proportion of non-bulk cargoes could be outside the coverage of the convention. Several delegations voiced their concerns about the extent of freedom of contract allowed under volume contracts.

The coverage of the convention would be greatly improved if only contracts subject to genuine negotiation were eligible to derogate from many of the provisions of the convention. However, it seems unlikely that this will succeed in changing the contemplated approach to volume contracts.

Intersessionally, Australia supported France in putting up a paper for consideration by UNCITRAL itself (as opposed to Working Group III), arguing that the scope for derogation from the draft convention should be much more limited. France and Australia argued for a narrowing of the scope of possible derogations under volume contracts from the convention. They proposed that the definition of volume contracts be modified to ensure that these are the result of genuine negotiations between shipper and carrier, and not merely contracts of adhesion as would be allowed by the current definition.

It was noted that the draft instrument initially submitted to the working group did not contain any general provisions favourable to freedom of contract. The initial version of the draft convention, clearly stated that "any contractual stipulation that derogates from this instrument is null and void, if and to the extent it is intended or has to its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee [...]." This has now been amended and the current version reflects a clear change in the direction of the group's work.

France and Australia argued that the shift, through the mechanism of volume contracts, from a fundamentally mandatory regime to a largely derogative regime represents a major change. They noted that the risk is that in some States obstacles may arise to the ratification of a convention whose provisions, which differ sharply from national legislation in the field, appear to be incompatible with fundamental principles of domestic law. It seems clear that further debate is required on this important issue.

7. PROCESSES INVOLVED IN CONSIDERATION BY AUSTRALIA OF WHETHER TO ADOPT THE DRAFT INSTRUMENT

Because of the combination of extensive derogations and the effects on Australian cargo claimants of the exclusive jurisdiction clauses, the new instrument may not be the best approach to meeting Australia's needs for a cargo liability regime. Our current modified version of the Hague-Visby Rules may better serve the interests of Australian shippers and consignees. When the text has been finalised, the Government will undertake consultations to ascertain the views of the various industry interests: Australian shippers and consignees (exporters and importers, bulk and non-bulk/liner), carriers (Australian and foreign, bulk and non-bulk/liner), marine insurance interests, maritime law interests etc.

Timing

The Working Group hopes to complete the second reading by end 2006, including deciding which areas to drop, with a final reading completed end 2007, and hopes that adoption by UNCITRAL will occur in 2008.

Input Sought

We would welcome your written views on the approach Australia should take in regard to the draft instrument. The papers for Working Group III, including the latest version of the draft instrument – currently WP56, are to be found on the UNCITRAL website at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html.

Written comments may be sent to:

Susan Downing
Office of International Law
Attorney-General's Department
National Circuit, BARTON ACT 2600
Or emailed to susan.downing@ag.gov.au

Written comments may be sent at any time but they would need to be received by the end of October 2006 in order to be taken into account for the November meeting.

Conclusion

There are many technical issues in the draft but overall, the major issues are the issues of jurisdiction and arbitration and the wide scope for parties to derogate from the provisions of the proposed convention under the volume contract exception. Australia will continue to engage in the debates of the Working Group and work towards negotiating a workable and widely-supported modern international instrument on the carriage of goods by sea. Whether or not Australia ultimately adopts a new instrument depends entirely on the final content of that instrument and whether the Government assesses that it is in Australia's interest to be a party to the instrument.