

A Delegate's Perspective on the recent developments in UNCITRAL's draft convention on the carriage of goods [wholly or partly][by sea]

**By
Susan Downing¹**

The 19th 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 16-27 April 2007. Over thirty countries actively participated in the session, with several more countries sending a delegation to observe the proceedings. In addition, representatives from industry and from a number of inter-governmental and non-government organisations participated. The Australian delegation comprised Susan Downing (Attorney-General's Department) and Charles Gibbons (Department of Transport and Regional Services).

The Working Group is currently considering a draft Convention on the carriage of goods [wholly or partly] [by sea] (“the draft Convention”). The draft Convention will introduce a new legal liability regime for the international carriage of goods where there is an international sea leg. The general aims of the draft Convention are to prepare a text which will:

- end the multiplicity of regimes (ie the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the regional arrangements);
- receive widespread international support;
- reflect modern transport & shipping practices (eg e-commerce); and
- achieve a limited network liability regime or “maritime plus” regime.

Background

The draft Convention was initially prepared by the Comité Maritime International and provided to the UNCITRAL Secretariat in December 2001 (“the CMI draft”). UNCITRAL then put the CMI draft on the agenda for the April 2002 meeting of the Working Group III. The Working Group accepted the CMI draft as a good basis for its deliberations and has been considering and revising the text ever since. In response to decisions taken in the Working Group, the CMI draft was then substantially revised by the UNCITRAL Secretariat. The Secretariat’s revised text² was circulated in time for the October 2003 session and the Working Group commenced a second reading of the revised text at that time.

The draft Convention was prepared initially as a maritime liability regime and then the Working Group debated whether or not to extend its coverage to door-to-door transportation. As a result of the debate, the Working Group focussed on door-to-door

¹ The views expressed in this paper are the views of the author alone and do not represent those of the Australian Government or of the Attorney-General’s Department.

² A/CN.9/WGIII/WP.32.

coverage and started to investigate whether this would be feasible. At the time, this decision was not without some controversy. The decision to examine door-to-door application was intended to reflect the reality that most international maritime transport is carried on a door-to-door basis. For example, the Working Group were provided with some figures which indicated that in 2001, of the 16 million containers that were either imported or exported to the USA, around 12 million containers were carried on a door-to-door basis. This represented close to 75% of the US trade comprising containers being moved under a multimodal contract. Anecdotal evidence suggested that this figure was increasing. It was also suggested that if the individual bills of lading were to be examined, an even greater proportion would be found to have been done on a multimodal basis. If those figures applied in other parts of the world, it could be concluded that the majority of international trade is done on a door-to-door basis. To those countries in favour of a multimodal regime, an instrument that only dealt with port-to-port liability would not reflect the real situation and would not apply to the majority of transported goods.

The contrary view was taken by countries who, either for their own domestic or constitutional reasons, would find it difficult to implement a multimodal convention and by those countries who are already parties to a unimodal land transport convention (such as the Convention on the Contract for the International Carriage of Goods by Road or the Convention Concerning International Carriage by Rail which already included certain mandatory provisions). In addition to wishing to create a new regime which did not conflict with these conventions, it was felt by some that maritime transport was typically more hazardous than other forms of transport. In recognition of the increased hazards, traditionally maritime liability has been more limited than for transport by air, road or rail. So to simply apply this lower level of liability to the other forms of transport was not seen as acceptable. The end result would be a weakening of the protection offered to shippers when their goods were in the custody of road, rail and possibly also air carriers.

The Commission, at the invitation of the Working Group, approved the working assumption that the draft Convention should cover door-to-door transport.³ However, after much debate, the Working Group decided that achieving a true multimodal and uniform liability regime would present too many difficulties. These difficulties included conflicts with existing transport conventions and with regional and national law. The Working Group settled on a limited network system or a “maritime plus” approach. In other words, a maritime liability regime that is extended to cover incidental non-maritime transport. This approach takes into account that a large proportion of marine transport is either immediately preceded by, or immediately followed by, a land transport leg.

Another issue was whether or not the transport segments preceding and following the maritime segment needed to be “international” in character. This has now been resolved. The Working Group is intending the instrument to apply only where the maritime leg is international and where the overall contract of carriage is between two different countries. The whole approach is contractual and if the contract of carriage provides for international door-to-door coverage then the new convention will apply on that basis. If the contract provides only port-to-port coverage (estimated to be

³ Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 223 and 224.

approximately 10% of shipments) then the instrument will apply on a port-to-port basis.

Notwithstanding the divisions between various States, the Working Group decided to concentrate on a maritime regime that had multimodal effect, as provided for in the draft text. It was felt that this approach would reflect the reality that most transport is carried on a door-to-door basis. The practical advice was that containers are not usually checked at the beginning or at the end of the sea leg but rather at the agreed end point (usually on the customer's premises). Similarly, nearly all liner trade is structured as door-to-door and this is likely to increase (due to the way e-commerce is increasing).

Another issue was whether or not the transport segments preceding and/or following the maritime segment needed to be "international" in character. It was generally thought that the draft instrument should apply as soon as an element of internationality characterized the overall contract of carriage, irrespective of whether or not certain legs were purely domestic.

The suitability and applicability of some principles of maritime law to other transport regimes initially caused some concern with aspects of the draft Convention. The CMI draft contained a lot of language that was difficult to adapt to other forms of transport. For example, the original obligations of the carrier were phrased in relation to ships and could not have applied to trucks or trains. Had the Working Group decided to draft a true multimodal regime then these sorts of discrepancies would need to have been addressed. In an effort to resolve such issues and avoid conflicts with other transport conventions, the draft Convention proposes a new international instrument that will establish a liability regime for maritime-plus transport.

The draft Convention is lengthy (currently over 100 articles) and ambitious. Complex issues are covered including: electronic communication; the period of responsibility; the obligations and liability of the carrier; the obligations and liability of the shipper; freight; and rights of suit. Topics such as "freight" have never been comprehensively dealt with in an international treaty before.

In April 2007, the Working Group completed its second reading and commenced its third reading of the draft Convention with a view to finalising the text in the forthcoming October 2007 session. This paper primarily covers the decisions taken in the April 2007 meeting.

Issues discussed at the April 2007 meeting (the 19th session)

The Working Group's third reading of the text proceeded with an article by article examination of the draft Convention. Generally only text that remained in brackets was discussed by the Working Group. Text that was unbracketed was taken to have been agreed to previously by the Working Group and reopening issues was not encouraged. The major issues covered were: electronic transport documents; the period of responsibility; obligations of the shipper (including in relation to dangerous goods); and the liability of the carrier for loss, damage or delay.

Many of the articles discussed at the 19th session were not controversial. Accordingly, the following discussion focuses on some of the more significant issues that arose and on those issues which attracted more controversy.

Freedom to contract – The Joint Proposal of Australia and France

One of the key issues that was discussed by the Working Group at the 19th session was the issue of whether parties should be allowed the freedom to contract out of the draft Convention.

The previous maritime transport treaties (eg Hague-Visby and Hamburg) all provided a mandatory liability regime. The current UNCITRAL text started off as a mandatory liability regime but was amended to provide an exemption for ‘volume contracts’ which allows parties to a volume contract to derogate from the mandatory regime. The Volume Contract Exemption (draft article 89) grew out of a proposal by the USA (put at the twelfth session in 2003) to include a provision on “Ocean Liner Service Agreements”. The current provision, when read together with the definition of volume contracts in draft article 1, provides a mechanism for derogating from the draft Convention in certain situations. Estimates of the size of this exemption vary but it appears to cover at least 70%, if not more, of the worldwide liner trade.

The Working Group considered the issue of whether parties should be able to contract out of the draft Convention on a number of previous occasions since 2003. Strong views were held by countries on either side of the debate and the Working Group struggled to find common ground. Nevertheless, a compromise text was drafted and incorporated (without brackets) into the draft Convention.

Australia and France were particularly vocal amongst those nations expressing their concern with the width of the volume contract exception. Apprehension was also expressed with regard to the change in international law (ie the abolition of a long-standing mandatory liability regime for the carriage of goods by sea). The definition of “Volume Contract” in draft Article 1 is:

“Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

The concern of Australia and France with this definition is that it lacks any limitation either by time, or by quantities shipped, or by the number of shipments. The carriage of two containers over a period of a year would appear to fall within the definition. If this is the case, and assuming that the above figure of 70% of the world liner trade is correct, the volume contract exemption will apply to a very large number of shipments.

Under the current text in the draft Convention, where the parties meet the following four conditions, they may contract out of the draft Convention:

1. Where the contract has been individually negotiated or prominently displays the sections of the volume contract containing the derogations from the draft Convention;

2. Where the contract obliges the carrier to perform a specified transportation service;
3. Where the provisions which alter the rights, duties, obligations or liabilities are set out prominently in the contract; and
4. Where the contract is something other than a bill of lading, transport document, electronic record, cargo receipt etc.

If the parties meet these conditions, then they are free to contract out of the majority of the draft Convention. The only provisions which the carrier could not contract out of would be the obligation to make and keep the ship seaworthy and the obligation to properly crew, equip and supply the ship. A shipper could not contract out of their obligations under draft article 29 to provide all necessary information, instructions and documents. Neither could they contract out of their obligations under draft article 32 with respect to dangerous goods.

In 2006, Australia and France put up a joint proposal (initially to the Commission) to limit the freedom of contract in the draft Convention. The joint proposal aimed to confine the scope of the exemption to those cases where there was a genuine volume contract, individually negotiated and between parties of comparable bargaining power. The joint proposal contained three options for limiting the contractual freedom: to tighten the definition of volume contracts; to set a minimum period of time (eg 1 year) for the contract; or to set a minimum amount of cargo.

The concern of Australia and France with respect to the requirements that something either be “individually negotiated” or “prominently display” the derogations, is that it will be possible for standard contracts containing derogation clauses to be submitted to shippers on a “take it or leave it” basis. In other words, the requirement that the shipper and carrier genuinely negotiate the terms of their contract may be more theoretical than practical. The concerns of Australia and France include that small shippers may not be adequately protected as they are likely to have insufficient bargaining power to require carriers to adhere to the minimum level of protection set out in the draft Convention.

As a result, the Joint Proposal of Australia and France Concerning Volume Contracts was prepared as a working paper and duly circulated (A/CN.9/612 and A/CN.9/WG.III/WP.88). The proposal was narrowly defeated and two of the States who spoke against the proposal even expressed their dissatisfaction with the existing text and their sympathy for the Australia/France proposal. When summing up the debate, the Chair found that there was not a sufficient majority to change the decision, made on 7 April 2006, to support the existing text. Therefore, the current text retains draft article 89, which will allow parties to volume contracts to vary or avoid the liability regime.

Other issues

The Working Group dealt with a number of other issues in the last two meetings. An attempt is made below to highlight some of the more significant issues.

Delay - The Working Group decided to re-examine the issue of liability for delay in delivery of the goods. The issue had been discussed at previous sessions and was one of “particular sensitivity on the part of both shippers and carriers”.⁴ A proposal had been made at a previous session to cover liability for delay on the part of both the carrier and the shipper. An argument was made that there were very few reported cases regarding the issue of liability for delay and that there was no commercial need for delay provisions to be in the draft Convention.⁵ Other countries claimed that either leaving the issue of delay out of the instrument, or allowing it to be subject to the freedom of contract provisions, would result in a situation where carriers would simply insert a standard provision in their contracts excluding them from liability for any damages due to delay.

The Working Group discussed many aspects to the issue of liability for delay, including whether it would be possible to find an appropriate cap on a shipper’s liability for delay. Australia put forward the formula from the *Carriage of Goods by Sea Act 1991*⁶ as a proposal for a limitation level for carrier’s liability for delay and argued that shipper’s liability for delay should be excluded from the draft Convention. Ultimately the Working Group was unable to devise a suitable cap and opted to delete liability for delay (for both the shipper and the carrier) from the draft Convention.

Liability of the Carrier - Draft article 12 deals with “Transport not covered by the contract of carriage”. One anomaly in draft article 12 is the decision to restrict the liability of the carrier for damaged goods to only those cases where the goods were carried on the carrier’s own vessel. The problem here is that it is common for carriers to organise both additional land and sea transport on behalf of the shipper. The end result is that the text allows a carrier to avoid responsibility for some legs of the journey by hiding behind its status as an agent. Arguably, this contradicts the widespread practice of carriers offering a door-to-door service and may well cause practical difficulties.

Dangerous Goods - Draft article 15 deals with the destruction of goods when they “may reasonably appear likely to become a danger to the environment”. Prior to the April 2007 session draft article 15 referred to goods that had become an “illegal or unacceptable danger” to the environment. This provision has then been expanded to refer instead to goods that may become a “danger to the environment”. The argument put was that this was an objective standard “against which a decision by the carrier to destroy allegedly dangerous goods could be measured.”⁷ However, the wording seems to provide a much looser test than that at international law (whether in IMO conventions discussing damage to the environment or in the United Nations Convention on the Law of the Sea). Arguably the text made it too easy for the carrier to find a justification for destroying the goods. After debating this point, the Working

⁴ P42 (para 178).

⁵ Ibid.

⁶ From Schedule 1 A, Article 4A:

The quantum of the carrier’s liability for loss caused by the delay is limited to whichever is the lesser of:

- (a) the actual amount of the loss; or
- (b) two and a half times the sea freight payable for the goods delayed; or
- (c) the total amount payable as sea freight for all of the goods shipped by the shipper concerned under the contract of carriage concerned.

⁷ P15 report.

Group decided to insert the word “reasonably” before the phrase “appear likely to become a danger to the environment”. This is a slight improvement but still leaves open the issue as to how such a provision will be interpreted.

Obligations of the Carrier - Draft article 16, dealing with specific obligations of the carrier, was not amended at the most recent session. However, it contains the continuing obligation of due diligence, which is one of the key changes to the law under the draft Convention. Carriers, and various industry groups, have expressed concern that this will increase the liability of carriers dramatically.

Draft article 17(2) contains a phrase which makes it possible that a carrier might avoid liability if there are two contributing causes to the loss or damage to the goods, but that only one of these causes is attributable to the carrier. The Working Group decided to leave issues of causality to national law and elected not to amend draft article 17(2). Therefore, whilst draft article 17(2) arguably might result in practical problems, interpretation of the provision will be left to national law.

A number of countries expressed concern that draft article 17(3) provides carriers with an “excessively generous list of exonerations”.⁸ This was particularly seen as problematic for smaller shippers and might lead to increased insurance premiums. It is true that the deletion of “error of navigation” (the nautical fault defence) in the draft Convention would counteract this. Whether or not the draft Convention as a whole favours carriers overall remains to be seen.

Himalaya Protection⁹ - In earlier meetings, Australia had joined other countries in raising the issue of the need for the draft Convention to include a reference to employees or agents in some circumstances. Many concerns were raised, including the practical elements in establishing when delivery had occurred and/or when a carrier’s liability had ended (particularly if the goods had been transferred to a road or rail company at the behest of the consignee). At the April 2007 session, the Working Group decided not to address matters of agency and therefore removed all references to employees or agents. The only exception to this is that the draft Convention will reconsider the definitions of “performing party” and “maritime performing party” and decide whether to extend Himalaya clause protection to the crew, master, independent contractors and employees of the carrier.¹⁰

Notice requirements - Draft Article 23 considers notice of loss or damage. The change made to this provision at the most recent meeting of the Working Group was that it now provides that a notice of loss or damage must be given within 7 working days at the place of delivery.¹¹

Deck Cargo - Draft Article 25 provides that if the parties have expressly agreed that the goods should be carried below the deck, and yet the carrier carries them as deck cargo, then the carrier is no longer entitled to the benefit of the draft Convention’s

⁸ P17 report.

⁹ A Himalaya clause is a clause in a contract of carriage which extends to third parties (eg stevedores) the defences and limitations that were available to the carrier. The name comes from the case *Adler v Dickson* [1955] 1 QB 158; [1954] 2 All ER 397; [1954] 3 WLR 696; 98 Sol Jo 787; [1954] 2 Lloyd's Rep 267 which involved a personal injury claim by a passenger on the liner “Himalaya”.

¹⁰ P23 report.

¹¹ P25 report.

limitation of liability. This provision had been in square brackets and the Working Group decided to remove the brackets and adjust the language slightly.¹²

Non-maritime carriers - The Working Group has made a policy decision to exclude inland carriers from the draft Convention.¹³ However, the issue was reconsidered slightly at the April 2007 meeting in response to a proposal by the United States of America.¹⁴ Their proposal, was to amend the definition of “maritime performing party” to exclude rail carriers, even if they were performing rail services¹⁵ within a port area. The Working Group postponed a decision on this point but it raises the issue as to whether other types of carriers (eg truckers or inland barges) might seek a similar exemption. The position of ferries operated by inland carriers will also be clarified.¹⁶

The phrase “within a port area” is itself problematic for some countries who have geographically proximate ports or different ports administered under a single port authority.¹⁷ Although the Working Group noted that Hamburg Rules used the term “Port” without defining it.

Contractual terms - Draft Article 88¹⁸ deals with the validity of contractual terms and provides that terms in the contract which directly or indirectly exclude or limit the liability of either the carrier or a maritime performing party are void. However, the latter part of draft Article 88 deals with contractual terms that alter the shipper’s rights and obligations under the draft Convention. Under this provision, it will be possible to increase the shipper’s obligations. Arguably the obligations (and liabilities) placed on the shipper under the draft Convention are already greater than currently provided for under international law. So to allow them to be increased (for example to change the basis of liability from one of the shipper’s negligence to one of strict liability) is a significant change. Of concern is the fact that the draft Convention does not place a limit or cap on a shipper’s liability. This is in contrast to draft article 62 which caps a carrier’s liability. Further, draft Article 88 relates to terms in a contract of carriage (ie not just the volume contract exception where parties have individually negotiated the express terms). There is a real risk that this will disadvantage the small shipper who is unlikely to have equal bargaining power to the carrier.

Future Meetings of the Working Group

The Working Group will continue its third reading of the draft Convention and commence the October 2007 session with an examination of draft article 42 on the evidentiary effect of the contract particulars. Forthcoming issues include: Chapter 10 on delivery of the goods; Chapter 11 on the rights of the controlling party; Chapter 12 on the transfer of rights; and Chapter 13 on the overall limits of liability.

¹² P27 report.

¹³ P29 report.

¹⁴ A/CN.9/WG.III/WP.84

¹⁵ The proposal described these as “ even if it performs services that might be considered the carrier’s responsibilities after the arrival of the goods at the port of loading or prior to the departure of the goods from the port of discharge...” A/CN.9/WG.III/WP.84, Annex, para 1.

¹⁶ p33 report, para 144.

¹⁷ P33 report, para 148.

¹⁸ p35 report.

The 20th meeting of the Working Group is scheduled to take place in Vienna from 15-26 October 2007 and it does seem as if the third reading might be completed during that session. A further session for January 2008 is tentatively scheduled in case extra time is required by the Working Group. Assuming the third reading is finalised at either the October or January sessions, it is anticipated that the draft Convention will be put before the Commission in 2008 with the expectation that it will be considered for adoption by the Commission.

Conclusion

The member and observer States of the Working Group are concentrating on developing a new international instrument that aims to modernise and harmonise the international law regarding the carriage of goods by sea. The issue is an important one for Australia as our economy depends on international trade and, being an island, the vast majority of that trade is conveyed by ships. Australia relies almost exclusively on foreign ships to fulfil its goods-transport requirements.

The subject matter covered by the draft Convention is complex and often contentious. Interests vary significantly, with some States being more inclined to protect carriers and others seeking to protect shippers. Shippers and carriers vary in size and this affects their power in commercial negotiations. Peak shipper and peak carrier bodies also seek different objectives.

Notwithstanding the difficulties outlined above, much has been achieved. The member and observer States of the Working Group are nearing the end of the development stage of a new international instrument that will update the international law regarding the carriage of goods by sea. The negotiations have been fruitful and are expected to result in a finalised text within the next few months. Assuming the text is finalised at the October 2007 session (or the January 2008 session), it is expected that the draft instrument will be presented for possible adoption by the Commission in mid 2008.

Like any international convention, the draft text contains a number of compromises made by the Working Group to accommodate the tensions between competing interests. However the draft text includes a number of improvements on previous regimes and modernises the law with respect to issues like the use of electronic documents. Importantly it has achieved one of the major aims which was a draft Convention that will reflect modern transport and shipping practices.

The Australian delegation remains committed to representing our national interest, including those of our exporters and importers and the carriers that service our international trade at the future meetings of the Working Group.

Submissions

The Attorney-General's Department welcomes submissions on the draft Convention and on the position Australia should take at the Working Group. Submissions may be made at any time, but in order to allow them to be incorporated into the brief for the October 2007 session, they would need to be made by 5 October 2007. Written submissions may be sent to :

Ms Susan Downing
Office of International Law
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Alternatively, submissions may be faxed to (02) 6250 5931, or emailed to:
susan.downing@ag.gov.au