

MLAANZ PAPER

UNCITRAL Convention – to infinity and beyond...or not?

- 1 My experience is largely from the perspective of cargo interests. However, I have attempted to review the UNCITRAL draft convention on transport law (**draft convention**) from the broader perspective of how it might work in Australia and what changes might be made to a system that we are familiar with.
- 2 To do this, I will consider three things:
 - Australia's multimodal regime under Amended Hague Rules (**our Rules**) and TPA.
 - The scope and application of the draft convention.
 - The potential impact of the draft convention in Australia.
- 3 Whenever significant change is proposed, there are always concerns that it shouldn't occur without good reason. An intimidating feature of the draft convention is that, if implemented, its 100 articles will replace the 14 articles that are currently in existence under our Rules. This begs the question, does the system we have need fixing? The draft convention has gained momentum (with particular support from the US), so now is the time for Australian transport and cargo industries to think about the future and participate in the reform process.

Introductory comments

- 4 The draft convention intends to replace other international carriage of goods by sea regimes, including the Hamburg, Hague and Hague-Visby Rules. As I see it, in order to placate and facilitate competing international interests, the end result is a draft document that is no longer a comprehensive multimodal scheme.
- 5 It has been dubbed the 'door-to-door' convention, but that is not an accurate description of how the draft convention will operate. At its core is sea carriage. A sea leg is mandatory for the draft convention to apply and it is conservative in its application to inland carriage.
- 6 Before getting into the mechanics of the draft convention, it is useful to make a few comments about Australia's regime. Although well-tested, not all problems have been ironed out, particularly, when it comes to limiting liability for inland transit.
- 7 The law surrounding multimodal carriage in Australia is regulated by a combination of statutes. I will discuss the *Carriage of Goods by Sea Act 1991* (Cth) (**COGSA**) which regulates the ocean leg and the *Trade Practices Act 1974* (Cth) (**TPA**) which regulates the inland leg.

Amended Hague Rules – scope and application

- 8 I will not discuss in great detail the operation of COGSA as many of you are familiar with it, suffice to say that our Rules under COGSA are an amended version of the Hague Rules that were drafted in order to protect Australia's substantial cargo owning interests.

- 9 The geographic scope of our Rules extends the duration for which a carrier is responsible for goods to the limits of a port or wharf. This extended responsibility exists at both the port of loading and the port of discharge.¹ The extension from the traditional 'tackle-to-tackle' locale to the broader 'port-to-port' region afforded by our Rules is important for cargo interests.
- 10 COGSA applies in this way:
- 10.1 Outbound carriage - our Rules apply;
- 10.2 Inbound carriage – our Rules apply **unless** the Hague, Hague-Visby or Hamburg Rules (or any modified version) apply by agreement or law. The effect of this is that COGSA only operates by default in respect of inbound carriage.
- 11 Formidable choice of law and exclusive jurisdiction clauses are contained within section 11 of COGSA. In so far as outbound shipments are concerned, not only are the laws of Australia deemed to apply, but any clause that purports to preclude or limit the jurisdiction of any Australian court is deemed void.

Trade Practices Act – scope and application

- 12 Inland transport within Australia is subject to the TPA. Section 18 of COGSA provides that it will over-ride the TPA² to the extent of any inconsistency. Therefore the TPA operates outside the port limits.
- 13 Section 67 of the TPA prevents parties 'contracting out' to their advantage by agreeing that a foreign law will govern the operation of the contract. If the law of Australia would normally govern the contract, then the TPA will apply.
- 14 Part V Division 2 of the TPA prescribes implied conditions and warranties in contracts for the supply of goods or services between an incorporated supplier and a consumer. Relevantly, a person is a consumer if the price of services (such as freight) does not exceed \$40,000 or if that amount is exceeded, the services are of a kind ordinarily acquired for domestic purposes.
- 15 Section 74(3) of the TPA is well known to the Australian transport industry as it bestows the privilege of freedom of contract that is not available to other industries. Specifically, section 74(3) enables inland transport operators to limit their liability *completely* for transportation or storage services provided for commercial purposes. This circumvents the onerous obligations imposed by the implied conditions and warranties contained within Part V Division 2 of the TPA.
- 16 Any services provided for commercial purposes that fall outside 'transportation or storage of goods' will be caught by sections 68 and 68A of the TPA. A relevant example is freight forwarding services. Section 68 provides that any term of a contract that purports to exclude, restrict or modify the application of Part V, Division 2 (i.e. the statutory incorporation of implied conditions or warranties) is void. Section 68A provides some relief by allowing limitation of liability to the extent of re-supplying

¹ Article 1 rule 3 of our Rules

² Part V Division 2

the services or the cost of re-supplying them (but only when services are provided for commercial purposes). Of course, any services provided for domestic purposes are subject to implied conditions and warranties and resulting liability cannot be limited.

17 Whilst the TPA affords a level of freedom of contract that enables carriers to limit their liability to a significant extent in commercial circumstances, a failure to properly draft or contractually incorporate a limitation clause will render it void. The privilege of liability limitation under the TPA is contingent upon:

17.1 clear reference to negligent acts; and

17.2 proper and timely evidence of acceptance.

18 Most carriers, with the assistance of good legal counsel, draft limitation of liability (or exclusion) clauses that comply with the TPA. However, in many cases the carriage contract is evidenced by a consignment note or similar transport document that is rarely signed by all the relevant parties to that contract. Accordingly, when loss occurs it becomes necessary to prove that, at the time of entering into the contract, the parties knew or ought to have known (by their prior dealings) that the exclusion clause formed part of the contract. Invariably, the issue of whether such a term was incorporated into the contract is one that most lawyers are keen to dispute.

19 In summary, if an exclusion clause is too wide or is not accepted, it will have no effect. Therefore, exclusion clauses rarely operate as intended. More commonly, they are used as a negotiating tool in order to effect a commercial settlement of a claim.

Draft convention

20 So how will the draft convention impact upon our regime? Firstly, it is necessary to analyse whether, in fact, this alleged 'door-to-door' convention will operate that broadly.

Scope and application

21 For the draft convention to apply a contract of carriage must satisfy the 'international test' by recording the place of receipt and the place of delivery in different states, and the port of loading and the port of discharge in different states. Obviously, there must also be a connection with a contracting state.

22 Importantly, volume contracts are excluded. Volume contracts are defined as contracts for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time.³ The precise definition is yet to be determined, but Australia and France have jointly proposed that the definition be narrowed as much as possible. It is estimated that more than 50% of Australia's containerised cargo is transported via 'volume contracts'.

23 This is an interesting statistic and it is critical to the viability of the draft convention. If correct, then a dual transport system might operate, bringing into question issues of inconsistency and what law should prevail. This complicates rather than simplifies the regulation of cargo transport.

³ The specification of the quantity may include a minimum, a maximum or a certain range.

- 24 To understand the scope, liabilities and benefits conferred by the draft convention it is important to appreciate that the star players are ocean carriers, followed closely by any person other than a carrier that performs the carrier's obligations *within port limits* and includes servants, agents or subcontractors of that person. These groups are called 'maritime performing parties'. Carriers and maritime performing parties have the burden of direct liability for their obligations. Those that perform obligations *outside port limits* are called 'performing parties' and they do not bear any direct liability.
- 25 A clear example of the emphasis placed on carriers and maritime performing parties is Article 4 which states:
- 'The defences and limits of liability provided for in this Convention and the obligations imposed by this Convention apply in any action against the carrier or a maritime performing party for loss of, damage to, or delay in delivery of goods.....'*
- 26 The 'door-to-door' ideal is embodied in Article 11 of the draft convention. The responsibility of the carrier for goods begins when the carrier (or performing party) receives the goods for carriage and ends when the goods are delivered. The time and location of delivery are as agreed or failing agreement, in accordance with the customs or usages of trade (such as Incoterms or the Vienna Convention).
- 27 But Article 11 is subject to Article 12 called 'Transport not covered by the contract of carriage'. Article 12 contemplates 'mixed contracts' namely an agreement (recorded in a single document) where the carrier agrees to perform carriage of goods in its capacity as 'carrier' as well as other transport or freight forwarding services as 'agent' of the shipper.
- 28 Article 12 provides that any specified transport services performed by the carrier beyond the contract of carriage will be at the risk of the shipper and covered by national law, not the draft convention.
- 29 It is not difficult to imagine the confusion that might reign. One means of providing clarity is to ensure that the obligation of the shipper to pay the carrier for the carriage contract is clearly separated from its obligation to pay other services providers. However, in practice, the document that evidences the contract may use relatively simple language that has unintended consequences.
- 30 For example, a carrier might agree to deliver goods inland 'at the request of' the shipper and payment obligations may be unclear. The inland transport arranged by the carrier has the potential to be interpreted as either a principal or as an agency obligation. The distinction between the two is likely to be difficult to draw, particularly where a variety of subcontractors are engaged.
- 31 In such cases, a carrier may argue that one or more of the subcontracts is arranged as agent of the shipper and therefore, any liability is at the risk of the shipper. In this way, a carrier could potentially avoid liability for all sub-contracted inland transport. The consequence of Article 12 is to reduce the scope of the draft convention to a 'port-to-port' or even a 'tackle-to-tackle' regime.
- 32 Article 12 also contains requirements that the carrier:
- 32.1 exercise 'due diligence' in selecting the other carrier;

- 32.2 conclude any contract with such other carrier on usual and normal terms;
and
- 32.3 do everything that is reasonably required to enable such other carrier to
perform duly under its contract.'

33 These provisions will have little (if any) practical effect, as they concern obligations that fall outside the performance of the contract of carriage and are therefore, outside the scope of the draft convention.

34 There is a potential that rail operators may be specifically excluded from the draft convention on the basis that the majority of their task is performed outside the port area.⁴ However, this may not be as simple or as logical as it seems in the context of the proposed inland ports in Australia. For example, there is a 60ha inland port proposed in Ipswich for the transport and storage of rail containers.

35 Further, the IRU (International Road Transport Union) argues that road carriers performing services within a port area should be excluded from the definition of a 'maritime performing party', effectively protecting road carriers from any direct liability.⁵ This is an important issue that Australia needs to consider.

36 The contraction of the draft convention's scope does not end there. Under Article 26, a contracting state may elect to have its national law prevail when loss from damage or delay to goods occurs *solely* before loading onto the ship or *solely* after discharge from the ship. This enables a nation state to apply its substantive law to cases of inland damage occurring within its jurisdiction. In these circumstances, the draft convention has the potential to shrink back to a 'tackle-to-tackle' regime.

37 Importantly, if Australia wishes to maintain exclusive jurisdiction in respect of localized cargo claims, it must declare that its national law will apply.⁶ In default, under the draft convention, a claimant has a right to institute judicial proceedings in another appropriate and competent court.

Concerns of uncertainty in the draft convention

38 I have already canvassed particular areas where ambiguous drafting of articles will cause uncertainty and there are two others I would like to mention: extended liability of carriers for the conduct of others; and proportionate liability.

39 Carriers are potentially liable for all parties who perform their obligations under the contract of carriage from the point of receipt of goods to the point of delivery, including employees, agents and independent contractors (Article 18).

⁴ Paragraph 138 of Working Group III Report on the 19th Session (A/CN.9/621). See also the opinions expressed by the US in document A/CN.9/WG.III/WP.84, according to which a rail carrier should not be considered as a 'maritime performing party'.

⁵ 'Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]: Proposals by the International Road Transport Union (IRU) concerning articles 1(7), 26 and 90 of the draft convention', document A/CN.9/WG.III/WP.90.

⁶ Article 94 of the draft convention

- 40 The draft convention working group has determined not to sharpen the drafting of this article, preferring to leave matters of employment, agency and independent contracts to national law.⁷
- 41 The problem I see with this proposal is that under Australian law, principals are not responsible (that is, they are not vicariously liable) for independent contractors, but for exceptional circumstances. In addition, the law surrounding vicarious liability for agents is unsettled in Australia.⁸ Without certainty in the draft convention claims involving agents and subcontractors will not be easily or cheaply resolved.
- 42 Proportionate liability has been also introduced so that if either a carrier or shipper is relieved of part of its liability, the draft convention provides that the carrier or shipper will only be liable for that part of the loss or damage that is attributable to the event for which it is liable (Article 17 rule 6 and Article 30 rule 2).
- 43 From a litigator's perspective, proportionate liability schemes often pose such an evidentiary hurdle for the plaintiff, that the defendant has the advantage of negotiating an early settlement on quite favourable terms.

Benefits of the draft convention

- 44 If the draft convention is adopted in Australia, we could potentially gain the following benefits:
- 44.1 Sea leg - obtain a level of international uniformity and extended liability for carriers
 - 44.2 Inland leg - extend our national law (i.e. TPA) within ports limits.
- 45 Whilst the draft convention is problematic in many respects, there is merit in seeking to adopt a uniform regime for the sea leg. Also, a great leap forward for cargo interests is the draft convention's proposal to extend the carrier's obligations to exercise due diligence to provide a seaworthy ship and properly receive, carry and preserve goods *throughout* the voyage (as opposed to 'before and at the beginning of the voyage').⁹ This will be useful for cargo interests, as when making claims it is often impossible to prove whether goods were damaged at sea as a result of poor maintenance prior to steaming, or as a result of an unforeseen event at sea.
- 46 Relevant to inland carriage, the draft convention enables contracting states to adopt their own laws within port limits where damage occurs before loading or after discharge. For Australia, applying the TPA within port limits has advantages for carriers.
- 47 An example of how a cargo claim within port limits would be dealt with under the TPA as opposed to international convention limits (e.g. our Rules) is:

40 ft reefer of kiwi fruit (23,680 kg) imported from Naples, Italy is totally damaged during transit within port limits:

⁷ Paragraph 97 of the 19th session of Working Group III in document A/CN.9/621

⁸ McCarthy, L. 'Vicarious Liability in the Agency Context' QUTLJJ, 2004 Volume 18

⁹ Article 3 rule 1 of our Rules

- applying our Rules (weight declared): AU\$87,142¹⁰
- applying the TPA: \$NIL

48 The draft convention limits could potentially be higher than those in our Rules, so the TPA is very 'carrier friendly'. Nevertheless, there is a significant down side to the use of TPA limitation clauses. As stated earlier, the TPA requires proof of incorporation into the carriage contract in order to be effective, whereas convention rules (like our Rules) simply take effect as terms.¹¹ So convention rules have the advantage of reliability which cannot be underestimated.

Conclusion

49 In my experience, one size rarely fits all and the draft convention is riddled with the problems associated with a document attempting to be all things to all nations. Nevertheless, there is benefit in working towards a system where there is one international cargo convention for carriage of goods by sea, with nation states tailoring inland carriage to their local needs.

50 This is a great opportunity for Australia to carefully consider the practical problems in our current regime and review whether we should as a nation endorse the draft convention.

¹⁰ The limits under Article 4 Rule 5 of our Rules are 666.67 SDRs per package/unit or 2 SDRs per kilogram of damaged cargo.

¹¹ *Teys Bros. Pty Ltd v ANL Cargo Operations* (1990) 2 Qd. R. 288 at 296