

Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

The United Nations Commission on International Trade Law (UNCITRAL) has been developing a Convention on Contracts for the International Carriage of Goods wholly or partly by Sea, based on text originally drafted by Comité Maritime Internationale (CMI). The Convention text has now been finalised. It is intended that the Convention will replace the Hague, Hague-Visby and Hamburg Rules and the US Carriage of Goods by Sea Act of 1936 but is more extensive than these, in that it not only contains provisions in respect of carrier responsibility, liability and limitation but also includes provisions relating to the use of electronic 'documents', rights of control over and transfer of rights to cargo and delivery of cargo, and liability of sub contractors employed by the contracting carrier (performing parties).

The International Group has worked closely with other industry organisations and has taken an active part in all of the Uncitral Working Group III sessions. Written submissions to the working group have in the main been made jointly with BIMCO and ICS and presentations on behalf of the industry at meetings of Working Group III have been made in line with prior strategy agreed with those organisations

The text of the draft convention will be considered by the UNCITRAL Commission in June 2008. It seems unlikely that the June session will result in changes of substance to the Convention, although drafting changes may be made to improve clarity. If approved by the Commission, the Convention will be passed to the UN Assembly for adoption in November 2008. Whether and when the Convention will come into force will depend on the ratification process and in particular, which states ratify in the early stages. The United States have participated very actively in the drafting process and it appears that a significant body of United States carriers and shippers support the latest draft. If they ratify early then a significant number of other states may well follow. The number of ratifications required in order for the Convention to come into force has been set at 20. It is possible, but unlikely, that this will change during its passage through the Commission. If the Convention is to have any real impact it will need to be adopted by a large number of States. In this regard it is worth noting that approximately 90 states have ratified the Hague / Hague-Visby Rules but only about 30 the Hamburg Rules and in the latter case no major trading nations.

1. Scope of Application / Freedom of Contract (Chapter 2 and 16)

Essentially the scope of the Convention extends to contracts of carriage (CoC) used in 'liner' transportation (as defined in the Convention) in which the place of receipt and delivery or the port of loading and discharge of the goods are in different states and one of the states has ratified the Convention. It does not extend to charter parties (C/Ps) or contracts for the use of or space on a ship. In order to accommodate the U.S., parties to 'volume contracts' (defined as a CoC that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time) in the liner trade are

permitted to derogate from the Convention, provided notice is given in accordance with strict criteria set out in the Convention. The Convention expressly provides that its scope does not extend to CoC in non-liner transportation other than to a transport document (when there is no C/P between the parties) which evidences the CoC and is a receipt for goods i.e. bills of lading issued pursuant to a charterparty when negotiated to a consignee. This reflects the position under Hague-Visby.

The Convention is not limited to tackle-to-tackle and port-to-port movements but extends to multi-modal contracts of carriage

Where loss or damage occurs during multimodal carriage other than during a sea leg, the Convention shall apply unless some other existing international unimodal convention is compulsorily applicable (e.g. CMR, the international road transport convention) to the extent that it contains provisions providing for a carrier's liability, limitation of liability and time for suit, in which case the provisions of that convention shall apply. This arrangement is known as a network liability system, which mirrors the current interrelation between Hague Visby and Hamburg with other unimodal conventions and the existing structure of cover under the rules of International Group Clubs and the Pooling Agreement.

Concealed damage, that is where it can not be determined on what particular leg the loss or damage occurred, will be subject to the Convention limits of liability.

2. Electronic Commerce (Chapter 3)

The draft Convention provides that an 'electronic record' of a contract of carriage or other information in electronic form has the same effect as a 'transport document', or its paper equivalent such as a bill of lading. It is intended that by including such provisions the Convention will be equally applicable to electronic trading.

3. Obligations and Liabilities of the Carrier (Chapters 4 & 5)

(i) Period of Responsibility

The carrier is responsible for the goods, subject to the provisions of the Convention, from the time that the carrier or a performing party receives the goods to the time that they are delivered.

(ii) Obligations

The current wording of the Convention is similar to that of Art 3.1 of the Hague Visby Rules to the extent that the carrier is obliged to properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods and to exercise due diligence in relation to the seaworthiness of the vessel, its manning, equipment and fitness for the carriage of cargo. Under the existing Hague Visby regime the due diligence obligation is restricted to the period before and at the beginning of the voyage. The draft Convention provides that the obligation is to be a continuing one throughout the voyage.

The Convention provides however that the carrier and shipper can agree that the loading, stowing and discharging operations can be performed by the shipper / consignee i.e. FIOS.

(iii) Liabilities

The carrier's liability remains fault based but is considerably more extensive than the existing liability regimes. The Convention retains a list of exceptions similar to but more extensive than that contained in Hague Visby, but in the form of presumptions of absence of fault on the part of the carrier rather than exonerations from fault, and with the onus on the carrier to sustain such presumptions and prove the absence of his fault. It sets out the method of allocating the burden of proof between claimant and carrier when determining liability for loss, damage or delay. It follows to a great extent the current Hague-Visby test (proof of loss or damage by claimant; establishment by carrier of absence of fault or proof of the operation of one of the exceptions; proof of breach of the seaworthiness obligations by claimant; proof of exercise of due diligence by the carrier) applied by the UK and US and a number of courts in other jurisdictions when interpreting the liability provisions of Hague Visby. The Convention also provides that the carrier is only liable for loss damage or delay to the extent that its breach of its obligations resulted in the loss damage or delay.

The major fundamental difference is the exclusion of the nautical fault defences i.e. error in navigation, pilotage or management of the ship.

The carrier, although liable for physical loss or damage caused by delay, is not liable for pure economic loss arising out of delay, as was first proposed, unless the time for delivery is the subject of agreement between the carrier and shipper. The agreement it seems need not necessarily be express but can be implied. Where the carrier is liable for economic loss he may limit his liability to 2 ½ x the freight but subject to a maximum overall cap of the compensation limits for physical loss or damage. Any liability the shipper may have for delay will not be governed by the Convention but will be left to national law.

Elimination of the nautical fault defence coupled with the extension of the carrier's due diligence obligations to the whole of the voyage as provided for in the Convention will substantially alter the allocation of risk between carrier and cargo and will accordingly result in an increase in the carrier's potential liability.

4. Maritime Performing Parties (Chapter 5)

The Convention introduces the concept of a 'maritime performing party', that is a party other than the contracting carrier who performs any part of the sea leg or provides services ancillary to the sea leg. Stevedores and terminals acting normally as sub-contractors of the carrier would be 'maritime performing parties' as would sea carriers performing under say an NVOCC transport document e.g. a bill of lading. Such a performing party would be subject to the same liabilities and responsibilities as the carrier but essentially only whilst it has custody of the cargo. Nevertheless the carrier remains liable for the whole of the performance of the contract of carriage. Sub-contractors who perform a non-maritime leg such as road hauliers or rail operators would be excluded from the operation of the Convention. The fact that the carrier may be liable, under the Convention, for the acts of a 'maritime performing party' represents a potential increase in

the carrier's exposure in much the same way as the 'actual carrier' concept introduced in the Hamburg Rules. Carriers may need to consider strengthening where possible their contractual rights of recourse against these other parties in the future.

The Convention contains a 'Himalaya' provision extending the defences and limitations available to the carrier to maritime performing parties.

The Convention also preserves the right of the carrier and shipper to enter into through transport arrangements.

5. Obligations and Liabilities of the Shipper (Chapter 7)

The text provides that the shipper is obligated to deliver the goods in a condition fit for carriage and to provide the carrier with relevant information, instructions etc in order for the carrier to fulfil his obligations.

The shipper's liability to the carrier for loss or damage is generally fault based and the onus of proving loss lies with the carrier.

However there are special rules for dangerous goods and documentary inaccuracies in relation to such goods. The shipper is under an obligation to inform the carrier of the dangerous nature of goods and to mark or label such goods in accordance with any applicable law or regulation. If the shipper fails to comply with his obligations he is strictly liable for all loss or damage which may result and is not entitled to limit.

6. Limits of Liability and Time for suit (Chapters 12 and 13)

The Convention provides for a package and weight-based limitation system as is the case in Hague Visby. The monetary limits have now been agreed at 875 SDR per package and 3 SDR per kilo.

As with Hague Visby the carrier loses his right to limit if the loss, damage or delay results from a personal act or omission done with intent or recklessly knowing that the loss or damage would probably result. The carrier loses his right to limit if he carries goods on deck in breach of an express agreement to carry them under deck.

Time for suit has been extended from the 1 year prescription period to 2 years.

7. Jurisdiction and Arbitration (Chapters 14 and 15)

Jurisdiction and arbitration provisions relating to claims are included in the Convention. Such provisions are contained in the Hamburg Rules but not in Hague Visby.

(i) Court Jurisdiction

The current text provides a claimant with a wide choice of jurisdictions connected with the carriage e.g. domicile of the carrier / place of receipt / delivery of the goods, load / discharge port, in which to bring claims. The Convention also prevents a carrier from commencing pre-emptive proceedings. Although parties to a CoC can agree a choice of jurisdiction in the CoC, such a choice does not have primacy, even if exclusive, unless contained in a volume contract, when it must satisfy a number of specified

criteria. However, most importantly, a state must 'opt-in' to the jurisdiction provisions for them to have effect.

The US appears very likely to opt in to these provisions. However so far as concerns EU Member States, the EU Commission will seek to achieve a uniform approach and has indicated that it is unlikely to opt-in because the restrictive provisions in the Convention regarding choice of jurisdiction in contracts of carriage run counter to the provisions of the existing EU Council Regulation of 2001, which essentially give effect to choice of jurisdiction clauses in certain categories of contracts, which would generally include CoC.

(ii) Arbitration

The arbitration provisions provide that the parties to a CoC can agree that disputes relating to the carriage of goods under the Convention can be referred to arbitration and that the arbitration proceedings shall take place either as agreed in the arbitration agreement or at the option of the claimant in any of the jurisdictions specified under the jurisdiction provisions, again unless contained in a volume contract when the choice of place of arbitration will have primary.

The arbitration provisions are also subject to an opt-in by states in the same way as the jurisdiction provisions.

8. Entry into Force (Chapter 18)

The Convention will enter into force 12 months after 20 States have ratified it.