Solving the Scope-of-Application Puzzle: Contracts, Trades, and Documents in the UNCITRAL Transport Law Project

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Documentary, contractual, and trade approaches have been under consideration for defining the scope of application of the UNCITRAL Draft Instrument on Transport Law for several years. Although a consensus had developed by early 2004 with regard to the types of transactions that should be governed by the new convention, there was no agreement on which of the three approaches should be used to give effect to that substantive consensus. Last December, at the UNCITRAL Working Group's session in Vienna, a small drafting group developed a hybrid proposal that combines elements from each of the three approaches. This article examines and explains that proposal, which has been accepted by the Working Group as 'a sound text upon which to base future discussions . . . once further reflection and consultations ha[ve] taken place'.

Introduction

The United Nations Commission on International Trade Law (UNCITRAL) continues work on its Transport Law project, which is designed to produce a new international convention to supersede the Hague Rules,[1] the Hague-Visby Rules[2] and the Hamburg Rules.[3] In 2004, I

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[1] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 1–1 (Frank L. Wiswall, Jr. ed., 7th rev. ed. 2004) (hereinafter Hague Rules).

[2] The phrase 'Hague-Visby Rules' describes the Hague Rules, *supra* note 1, as amended by the 1968 Visby Amendments, Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmnd. 6944) (entered into force June 23, 1977), *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 1–2 (Frank L. Wiswall, Jr. ed., 7th rev. ed. 2004). In many countries, the 1968 Hague-Visby Rules have been further amended by the 1979 Special Drawing Right (SDR) Protocol. Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmnd. 9197) (entered into force Feb. 14, 1984), *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 1–2A (Frank L. Wiswall, Jr. ed., 7th rev. ed. 2004).

[3] United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 17 I.L.M. 608, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 1–3 (Frank L. Wiswall, Jr. ed., 7th rev. ed. 2004) (hereinafter Hamburg Rules).

summarized the project and explained the progress that had been made, as of March of that year, on two major topics relating to the scope of application.[4]

Substantial consensus then appeared to exist on the types of transactions that should be governed by the new convention, but it was unclear how that consensus would be implemented.[5] At an informal seminar held in London at the end of February 2004,[6] three distinct approaches were considered: a 'documentary' approach (in which the covered transactions would be defined on the basis of the type of document issued for their transport), a 'contractual' approach (in which the new convention would specify the types of contracts that it covered), and a 'trade' approach (in which coverage would be limited, for example, to the liner trade).[7]

Everyone anticipated that UNCITRAL's Working Group III would turn to this issue at its thirteenth session,[8] which was held in New York in May 2004.[9] Unfortunately, that turned out to be impossible. Professor Francesco Berlingieri (who had hosted the London seminar) and the entire Chinese delegation were unable to travel to New York. The absence of these key participants made it inadvisable to proceed with the discussion of such an important topic, and the Working Group accordingly decided to take up other subjects during the spring 2004 meeting.[10] The New York session nevertheless saw one piece of important progress that is relevant to this discussion. Near the end of the meeting, 'a number of delegations [took] the initiative of creating an informal consultation group for [the] continuation of the discussion between sessions of the Working Group'.[11] Professor Johan Schelin, the Swedish delegate, agreed to co-ordinate this informal consultation group, which is 'open to all interested delegations and observers',[12] and he appointed individual delegates to chair sub-groups addressing specific topics. Professor Hannu Honka, of Finland, agreed to chair the sub-group on Freedom of Contract, which was broadly defined to include the scope-of-application issue.

During the period between the close of the New York session and the opening of Working Group III's fourteenth session, which was held in Vienna in November and December 2004, work proceeded on a number of subjects, including this one. Professor Honka circulated an initial paper seeking comments from every delegation and observer. On the basis of the responses he received, he circulated a final discussion paper to assist the Working Group by defining the relevant issues, describing the various views that had been expressed, identifying areas of possible consensus, raising questions that required further consideration, and proposing possible solutions as a framework for further discussion.[13]

During the Vienna session, when the Working Group was ready to consider freedom of contract (on Wednesday afternoon, 1 December 2004), the chair naturally invited Professor Honka to open the discussion with a report of the intersessional work.[14] Proceeding on the

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[4] *See* Michael F Sturley, *Scope of Coverage Under the UNCITRAL Draft Instrument* (2004) 10 JIML 138.
[5] *See id*. at 144.
[6] Professor Johan Schelin, the Swedish delegate, served as the rapporteur for the London seminar. His report, *Freedom of Contract and Carriage of Goods: Report from the London Seminar, 20 to 21 February 2004* (6 March 2004) (hereinafter *London Seminar Report*), is available on the website of the University of Stockholm's Institute of Maritime Law.
[7] *See* Sturley, *supra* note 4, at 144.
[8] *See id*. at 144 & n.46.
[9] *See Report of Working Group III (Transport Law) on the work of its thirteenth session*, UNCITRAL, 37th Sess., U.N. Doc. A/CN.9/552 (2004) (hereinafter *Thirteenth Session Report*).
[10] *See generally id*. (reporting on the work of the New York session); Francesco Berlingieri, *The May 2004 Session of the UNCITRAL Working Group on Transport Law*, 2004 DIR. MAR. 1 (same).
[11] *Thirteenth Session Report*, *supra* note 9, para 167.
[12] *Id*.
[13] Professor Honka's discussion paper, 17 November 2004, is available on the website of the University of Stockholm's Institute of Maritime Law. http://www.juridicum.su.se/transport/Main/eframep.htm.
[14] *See Report of Working Group III (Transport Law) on the work of its fourteenth session*, UNCITRAL, 38th Sess., para. 82, U.N. Doc. A/CN.9/572 (2004) (hereinafter *Fourteenth Session Report*).

basis of his final paper, the Working Group was able to move quickly to the key issues at the heart of the subject. It soon became clear that at least some of the substantial consensus that had become evident during the London meeting was shared by the full Working Group.[15] In particular, there was widespread agreement on the types of transactions that should be governed by the new convention.[16] Broadly speaking, these were transactions that are functionally similar to those covered under the Hague and Hague-Visby Rules, including those covered by non-negotiable bill of lading substitutes (such as sea waybills or data interchange receipts), those covered by electronic equivalents of bills of lading and their substitutes, and those in which no document is issued but the parties are functionally similar to those in a traditional bill of lading transaction.[17] Similarly, there was widespread agreement on the types of transactions that should be excluded. Broadly speaking, these were transactions that are functionally similar to those excluded from the Hague and Hague-Visby Rules by the charter-party exclusion.[18] In addition to transactions under charter parties, there was a consensus that transactions under towage contracts, heavy lift contracts, and the like (which as a general rule are specifically negotiated between parties of more or less comparable bargaining power) should also be excluded.[19] In view of this widespread agreement on matters of basic substance, most of the discussion on this subject in Vienna centered on how the consensus should be implemented. Solving that puzzle will also be the focus here.

Theoretical approaches

Description of theoretical approaches

During the London seminar in February 2004, various approaches were identified for defining the scope of application of the new instrument.[20] For example, the Hague and Hague-Visby Rules adopt what can be described as a 'documentary approach' because the application of the Rules turns on the issuance of a particular type of document – 'a bill of lading or any similar document of title'.[21] Although the analysis has varied in different jurisdictions, in some countries carriers are able to avoid the application of the Rules by issuing documents that do not satisfy the local definition of a 'bill of lading'. The Hague and Hague-Visby Rules also adopt a documentary approach to describe the transactions that are excluded from coverage: '[t]he provisions of this convention shall not be applicable to charter parties'.[22]

The Hamburg Rules adopt what can be described as a 'contractual approach' because their application depends on the parties concluding a particular type of contract (without regard for the issuance of any particular document to evidence that contract).[23] The Hamburg Rules, by their own terms, 'are applicable to all contracts of carriage by sea' under specified

[15] *See id.* para. 89.
[16] This consensus does not yet extend to some closely related issues, such as the US proposal for the unique treatment of a particular type of contract that has been dubbed an 'Ocean Liner Service Agreement' or 'OLSA.' *See infra* notes 113–114.
[17] In common law systems, the category of transactions intended to be covered would largely correspond to the 'common carriage' situation, but the legal concept of common carriage would not be widely understood in other legal systems.
[18] Hague Rules art. 5; Hague-Visby Rules art. 5.
[19] In common law systems, the category of transactions intended to be excluded would largely correspond to the 'private carriage' situation, but the legal concept of private carriage would not be widely understood in other legal systems.
[20] *See London Seminar Report*, *supra* note 6, part III(B)–(C).
[21] Hague Rules art. 1(b); Hague-Visby Rules art. 1(b).
[22] Hague Rules art. 5; Hague-Visby Rules art. 5.
[23] Transport law conventions governing other modes of carriage also adopt a contractual approach. *See, eg* Convention on the Contract for the International Carriage of Goods by Road (CMR), May 19, 1956, art. 1(1), 399 U.N.T.S. 189.

circumstances,[24] and a 'contract of carriage by sea' is defined as 'any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another'.[25] Although the Hamburg Rules give the shipper the right to demand the issuance of a bill of lading[26] and recognize the possibility that a 'bill of lading or other document [might] evidenc[e] the contract of carriage by sea',[27] the issuance of a bill of lading is relevant to the application of the Rules only when it is issued under a charter party.[28]

At the London Seminar, a new proposal was discussed to adopt what was described as a 'trade approach', in which the application of the new instrument would generally turn on the type of trade in which the carrier was engaged. Shipments in the liner trade would be governed by the new convention on the theory that these transactions occur in a context that generally justifies the application of mandatory law. Contracts in the liner trade are less apt to be individually negotiated because form contracts (such as bills of lading and sea waybills) are the norm, and it has generally been assumed that an equality of bargaining power between the shipper and the carrier is less common in the liner trade. The trade approach would exclude shipments in the tramp trade, where individually negotiated charter parties and an equality of bargaining power are the norm.

These three theoretical approaches to defining the new convention's scope of application do not indicate any disagreement on matters of substance. Each of the three is intended to cover the same types of transactions, and there was broad agreement on what those transactions should be.[29] The issue is rather a practical one: which of the approaches will best accomplish the goal of including the transactions that should be included (and, perhaps just as important, excluding the transactions that should be excluded) with clarity and predictability? Not only must the courts in a wide range of legal systems be able to recognize when the new convention should apply, but the commercial parties must be able to tell when they must conform their behaviour to mandatory rules (and know when they have the freedom to contract on terms of their own choosing).

Analysis of the three approaches

Each of the three individual approaches under consideration has certain advantages and disadvantages. Each of them could enable the new convention to cover those transactions for which there is consensus support for coverage (albeit with some adjustments for special cases), at least to the extent that it is now possible to identify those transactions. And each of the three is superior in some way to the other two. But by the same token, each of the three is inadequate in some way to accomplish all that needs to be done.

The documentary approach

The documentary approach is familiar to the industry, having been in force for over 80 years. It is well recognized that the version adopted in the Hague and Hague-Visby Rules is too narrow for modern needs. The industry now uses an array of documents in addition to the traditional bill of lading, and many of these do not qualify as 'similar documents of title' (at least in some legal systems). Furthermore, allowance must be made for the future use of electronic commerce. Perhaps both problems could be solved with an updated list of covered

[24] Hamburg Rules art. 2(1).
[25] Hamburg Rules art. 1(6).
[26] Hamburg Rules art. 14(1).
[27] Hamburg Rules art. 2(1)(d), (e). The Hamburg Rules also recognized the possibility that no bill of lading will be issued. *See*, *eg*, art. 6(2)(a).
[28] *See* Hamburg Rules art. 2(3) ('where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer').
[29] *See supra* notes 14–19 and accompanying text.

documents. Including explicit references to sea waybills, data interchange receipts, and electronic records would be an easy task. The risk, of course, is that this solution may quickly prove to be too narrow. The industry will undoubtedly develop new forms of documentation more quickly than the international legal community can develop a new convention (or even an amending protocol) to cover them. Another solution might be to conclude the expanded list of covered documents with a general phrase, much as the Hague and Hague-Visby Rules cover not only bills of lading but also 'similar' documents of title. The new convention might cover 'bills of lading, sea waybills, data interchange receipts, *and similar transport documents*' (along with their electronic equivalents). Although such a vague term might enable the courts to update the convention to keep pace with a changing industry, it would leave the convention's coverage at least somewhat ambiguous, with clarity obtained only through costly litigation that would be likely to produce different results in different jurisdictions.

At the London Seminar, Professor Charles Debattista of the University of Southampton proposed a broader solution that would update the documentary approach by more rigorously defining (in general terms) the types of documents that would trigger coverage under the new convention. He suggested that coverage should extend:

> to all bills of lading and to documents, which, whether in paper or in electronic form, acknowledge the receipt of goods for shipment and constitute, are evidence of, or incorporate by reference the terms of a contract of carriage.[30]

Thus, in addition to explicitly covering bills of lading, Professor Debattista would cover other transport documents in general terms if they serve two of the major functions of a bill of lading. But he would not require these other transport documents to serve the third major function of a bill of lading – the document of title function now mentioned in the Hague and Hague-Visby Rules. Thus he would pick up sea waybills, data interchange receipts, and their electronic equivalents, and would explain to courts how new transport documents must be similar to these existing forms in order to be covered.

The Debattista proposal improves the existing documentary approach, but major problems remain. On a conceptual level, the type of document issued has always been little more than a surrogate for the type of contract concluded, and thus the documentary approach has always been an indirect means to achieve the ends that a contract approach would accomplish more directly. On a more practical level, the documentary approach is incapable (no matter how broadly the covered documents are defined) of dealing with cases in which the parties do not intend that any document ever be issued for a specific shipment. To the extent that document-free transactions are increasingly common (in European short seas shipments, for example) and within the intended scope of the new convention,[31] the documentary approach standing alone will inevitably be inadequate to define the convention's scope of application. Finally, the pure documentary approach is politically infeasible. In the Working Group, a number of delegations supported the view 'that the documentary approach [is] obsolete, and that it [does] not fit easily within the scheme devised by the draft instrument'.[32] Although the documentary approach could be acceptable as part of a compromise solution,[33] it did not attract sufficient support to retain its primary role in defining scope of application.

The contract approach

The contract approach does not have the long history of the documentary approach, but it is still familiar to the industry. The Hamburg Rules have been in force in some countries for over

[30] *London Seminar Report*, *supra* note 6, annex 1, art. 1.
[31] *See supra* note 17 and accompanying text.
[32] *Fourteenth Session Report*, *supra* note 14, para 84.
[33] *See id.* para 89.

a decade, and there has been ample opportunity to study this approach and identify its weaknesses. Furthermore, the Comité Maritime International's preliminary work[34] and the UNCITRAL Working Group's discussions to date[35] have all been based on the contract approach (albeit with what seems to be a document-based exclusion for certain transactions, such as those governed by charter parties,[36] that the Working Group has tentatively agreed should not be subject to the Instrument). Some weaknesses have been identified, but abandoning the approach entirely at this late stage would sacrifice a great deal of study and careful consideration of the interrelationship between the scope provisions and the other aspects of the proposed new convention.

The principal criticism of the contract approach has been based on the fear it might accidentally include transactions that are functionally equivalent to excluded transactions (and that there would be a consensus to exclude if the Working Group were to consider them) but that do not fall within the defined terms of the exclusion. For example, the Working Group's latest draft excludes 'charter parties', and in brackets excludes 'contracts of affreightment, volume contracts, or similar agreements'.[37] Heavy lift contracts are not charter parties, but are they 'similar agreements'? The Working Group had not specifically discussed them,[38] but the argument for excluding them is indistinguishable from the argument for excluding charter parties, contracts of affreightment, and volume contracts. Critics nevertheless worry that a court may decide to include heavy lift contracts (applying the broad contract of carriage definition) if they are not explicitly excluded. And these critics worry that the industry's next specialized, individually negotiated, non-liner contract – a new form of contract that the Working Group by definition had no opportunity to consider – might also be included within the scope of the new convention. They fear that a court might conclude that this new form of contract, whatever it may be, is not sufficiently 'similar' to a charter party, or that it is not 'similar' in the proper way. This fear would be particularly pressing if no effort were made to describe the sort of similarity that would be relevant.

The trade approach

The trade approach does not have the tradition and familiarity of the documentary and contract approaches, but it has a certain logical appeal. To a considerable extent, the Hague Rules' distinction between bills of lading and charter parties was intended to distinguish between liner shipments and tramp shipments.[39] The trade approach may be able to accomplish directly what the Hague Rules' documentary approach was designed to achieve indirectly. On a more practical level, the trade approach addresses the principal criticism of the contract approach. It may be impossible to predict the industry's next specialized, individually negotiated

[34] *See, eg*, CMI Draft Instrument on Transport Law, art. 3.1, 2001 CMI Yearbook 532, 543.

[35] *See Draft instrument on the carriage of goods [wholly or partly] [by sea]*, UNCITRAL, U.N. Doc. A/CN.9/WG.III/WP.32, art. 2(1) (2003) (hereinafter *WP.32 Draft Instrument*); *Provisional redraft of the articles of the draft instrument considered in the Report of Working Group III on the work of its twelfth session*, UNCITRAL, U.N. Doc. A/CN.9/WG.III/WP.36, para. 6 (2004) (art. 2(1)) (hereinafter *WP.36 Redraft*); *Preliminary draft instrument on the carriage of goods by sea*, UNCITRAL, U.N. Doc. A/CN.9/WG.III/WP.21, art. 3.1 (2002) (hereinafter *WP.21 Draft Instrument*).

[36] *See WP.32 Draft Instrument*, *supra* note 35, art. 2(3); *WP.36 Redraft*, *supra* note 35, para 6 (art. 2(3)); *WP.21 Draft Instrument*, *supra* note 35, art. 3.3.1.

[37] *WP.32 Draft Instrument*, *supra* note 35, art. 2(3). Some provisions in the Draft Instrument were revised in later documents. *See WP.36 Redraft*, *supra* note 35; *Provisional redraft of the articles of the draft instrument considered in the Report of Working Group III on the work of its thirteenth session*, UNCITRAL, U.N. Doc. A/CN.9/WG.III/WP.39 (2004). Article 2(3) of the *WP.32 Draft Instrument* was not changed in either of the subsequent redrafts. Indeed, article 2(3) is substantially the same as a provision in the Working Group's original Draft Instrument. *See WP.21 Draft Instrument*, *supra* note 35, art. 3.3.1.

[38] At the most recent Vienna session, heavy lift contracts were mentioned for the first time. *See Fourteenth Session Report*, *supra* note 14, para. 85. Not surprisingly, there was 'broad agreement that … heavy lift contracts should be excluded from the application of the draft instrument'. *Id.*, para 89.

[39] *See* Sturley, *supra* note 4, at 140–41 & nn.20–27.

contract comparable to the heavy lift contracts that the Working Group had overlooked for several years. But it can at least be recognized that these types of contracts, by their very nature, will not occur in the liner trade. By limiting the new convention's scope of application to the liner trade, a major risk of inadvertent coverage could be avoided.

The trade approach is still subject to several criticisms. First, it is a new approach, and thus can not be adopted with the same confidence that every possible problem has been considered and resolved. With no history, it is difficult to predict how courts will interpret it, and thus it may fail to bring the uniformity and predictability that the instrument seeks. Some critics also worried that it may be too difficult to distinguish between liner shipments and tramp shipments, or between liner and non-liner shipments. Although, in most cases, there is little doubt in which category a transaction falls, the line can still be blurry at the margins.

Secondly, the trade approach is inadequate by itself to define the new convention's scope of application in a manner that will give full effect to the consensus that emerged at the Working Group's last session. Most obviously, the industry has long accepted, at least since the adoption of the Hague Rules,[40] that mandatory law should govern at least some transactions in the tramp trade, including cases in which a bill of lading issued under a charter party has been negotiated to a third party.[41] Thus this coverage has consistently been included in the Working Group's drafts.[42] Approaching the issue from the opposite perspective, there is a broad consensus that at least some transactions in the liner trade, such as slot charters, should *not* be covered.

There is also a gap between the liner and tramp trades. Within this gap, shipowners operate essentially as liner carriers, but they do not fully satisfy the requirements of the liner trade.[43] For example, the liner trade is generally understood to require a regularly scheduled service, operating either on a timetable or at least on announced sailing dates.[44] But some carriers (such as those in the non-containerized reefer trade) offer what would otherwise be recognized as liner services except that they operate on an 'on-demand' basis rather than as a regularly scheduled service. When shippers have a higher demand, they sail more frequently, and when shippers' demand is lower, they sail less frequently. But they issue traditional bills of lading (and are thus governed by the Hague or Hague-Visby Rules today), and the policy justifications for applying a mandatory law to them apply just as strongly as in the strict liner context.

A practical solution to the scope-of-application puzzle

Although it was encouraging to have broad agreement on the types of transactions that the new convention would cover, everyone recognized that an agreement on the substance was not enough. The Working Group still needed to produce a draft that could effectively implement that substantial agreement. A 'simple' solution would not work because neither the industry nor the Working Group wanted the substantive result that a simple solution would produce. The challenge was to find a workable drafting solution that could give practical effect to a fairly complex substantive agreement. With three completely different approaches, none of which was effective by itself, and no obvious way to combine the approaches, the Working Group needed to solve a challenging puzzle.

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[40] *See* Hague Rules arts. 1(b), 5.
[41] *See also* Hague-Visby Rules art. 1(b), 5; Hamburg Rules art. 2(3).
[42] *See WP.32 Draft Instrument*, *supra* note 35, art. 2.4; *WP.21 Draft Instrument*, *supra* note 35, art. 3.3.2.
[43] The common law distinction between 'common carriage' and 'private carriage' might better define the line that the trade approach seeks to draw, but these legal concepts would not be widely understood in other legal systems. *Cf. supra* notes 17 and 19.
[44] *Cf. infra* notes 76–79 and accompanying text.

Drafting the practical solution

During the course of previous sessions, the Working Group had learned that more progress can be made on improving a draft if a small group of delegates with particular interest and expertise in an issue meets informally during the lunch breaks and evenings than if the entire Working Group attempts to revise the draft in a general meeting.[45] During the October 2003 session in Vienna, for example, small drafting groups were able to achieve considerable progress on questions relating to the carrier's liability[46] and to advance the discussion on the scope of application issue.[47] During the most recent session, therefore, the Working Group resumed this approach almost immediately. A small drafting group met during lunch on the second day to discuss the drafting of a revised article addressing the carrier's liability,[48] and it continued its work for the rest of the first week during morning sessions before the Working Group convened, during the lunch breaks, and during evening sessions after the general meeting had adjourned.[49]

On Friday afternoon of the first week of the session (3 December 2004), as the carrier's liability drafting group was completing its work, several delegates informally discussed how progress might be made in drafting language to give effect to the Working Group's apparent consensus on the new convention's scope of application. Six delegates[50] agreed to meet informally that evening to see if it might be possible to propose a compromise solution drawing from all three of the approaches that the Working Group was then considering, avoiding each one's weaknesses while taking advantage of the strengths. This meeting did not even rise to the level of 'informal drafting group', as it had not been announced to the full Working Group and it was recognized that most delegates would already have made other plans for a Friday evening in Vienna,[51] but it was thought that a joint suggestion from their six delegations might be useful as a basis for further discussion in a small drafting group.[52] In the end, four of the six[53] were able to devote the weekend to preparing an initial draft, which was then revised and approved by their six delegations[54] on Monday 6 December, as a jointly-proposed 'Drafting Suggestion'.

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[45] The small groups are entirely self-selected. Although the chair of the full Working Group may ask a particular delegate to chair an informal drafting group, simply as a means of providing some co-ordination, any delegate or observer is welcome to attend the small group's meetings, which are announced during the general session and held in a conference room reserved by the UNCITRAL Secretariat. The size of the group varies according to the schedule and the subject matter under discussion, but the range is generally from about two dozen to about half a dozen members in attendance. Even this group is often too large for effective drafting, so on occasion an even smaller group (sometimes only one or two members) will prepare a draft (typically in the late evening) for further discussion by the informal drafting group the next morning or during the next lunch break.

[46] *See Report of Working Group III (Transport Law) on the work of its twelfth session*, UNCITRAL, 37th Sess., paras 96–116, U.N. Doc. A/CN.9/544 (2003) (hereinafter *Twelfth Session Report*).

[47] *Id*. paras. 61–74.

[48] *See, e.g., Fourteenth Session Report*, *supra* note 14, para 19.

[49] The small drafting group's effort was ultimately successful in producing a revised draft for article 14 that was accepted by the full Working Group. *See id*. para 33.

[50] The six delegates attending this meeting were Professor Hannu Honka of Finland, Professor Francesco Berlingieri of Italy, Professor Tomotaka Fujita of Japan, Professor Gertjan van der Ziel of the Netherlands, Professor Johan Schelin of Sweden, and Professor Michael Sturley of the United States.

[51] *See supra* note 45 (describing the practice with respect to small drafting groups).

[52] It is common for two or more countries to make joint proposals to the full Working Group. The four Nordic countries (Denmark, Finland, Norway and Sweden) meet regularly among themselves, and have made several joint submissions – some formal, *see, eg*, *Comments from the Nordic countries on the freedom of contract*, UNCITRAL, U.N. Doc. A/CN.9/WG.III/WP.40 (2004), and some informal, *see, eg*, *Twelfth Session Report*, *supra* note 46, para 12. At the twelfth session, a joint statement by Italy and the Netherlands was particularly valuable in advancing a compromise solution on the treatment of performing parties. *See id*. paras. 20–21.

[53] Professor Berlingieri was unable to participate because he had returned to Italy, and Professor van der Ziel had a prior commitment.

[54] Professor Stefano Zunarelli represented Italy during the second week of the session, but Professor Berlingieri had received a copy of the draft and both of them were able to participate in the process.

The UNCITRAL Secretariat circulated the Drafting Suggestion to the full Working Group when the session convened on Tuesday morning, 7 December 2004, and the chair of the Working Group referred the proposal to an open small drafting group, chaired by Professor Honka (who had presided over the Freedom of Contract sub-group).[55] The small drafting group met later that day to discuss the Drafting Suggestion, accepted the basic 'hybrid approach' (subject to further reflection, consultation, and discussion after the meeting), and proposed a number of specific drafting changes. The Working Group then discussed the revised draft on the last substantive day of its session, whereupon it 'agreed that the redraft represented a sound text upon which to base future discussions on scope of application, once further reflection and consultations had taken place'.[56]

Analysis of the draft

In its most recent drafts of the instrument, the Working Group had addressed scope of application primarily in article 2,[57] although some of the substantive aspects of the issue had spilled over into the 'contract of carriage' definition of article 1(a).[58] The new scope-of-application draft revises the 'contract of carriage' definition, adds two new definitions to article 1, and addresses the substantive aspects of the issue in four new articles (numbered from 2 to 5).[59] Either these new articles will need to be combined in a new article 2 or all of the articles in the draft instrument will need to be renumbered. For the time being, however, it will be more convenient to refer to the new proposal as the Scope-of-Application Draft, and to use its article numbers.

The contract of carriage definition (article 1(a))

The instrument's key definition for the scope-of-application issue is article 1(a)'s 'contract of carriage' definition. In the WP.32 Draft Instrument, a 'contract of carriage' was simply 'a contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly by sea from one place to another'.[60] But in the WP.36 Redraft, the definition was expanded to include several additional elements:

> Contract of carriage means a contract under which a carrier, against payment of freight, undertakes to carry goods by sea from a place in one State to a place in another State; such contract may also include an undertaking by such carrier to carry the goods by other modes prior to or after the carriage by sea.[61]

A new article 2(1*bis*), in square brackets, attempted to provide some clarification of what was meant by an undertaking to carry goods by sea. It provided:

> [A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage under article 1(a), provided that the goods are actually carried by sea.][62]

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[55] *See supra* notes 11–14 and accompanying text.
[56] *Fourteenth Session Report*, *supra* note 14, para 109.
[57] *See WP.32 Draft Instrument*, *supra* note 35, art. 2; *WP.36 Redraft*, *supra* note 35, para. 6 (revising part of art. 1 and art. 2).
[58] *See infra* notes 60–65 and accompanying text.
[59] The new draft (hereinafter *Scope-of-Application Draft*), in the form accepted by the full Working Group as a basis for further discussion, is reprinted at *Fourteenth Session Report*, *supra* note 14, para 105.
[60] *WP.32 Draft Instrument*, *supra* note 35, art. 1(a). The same definition appears at *WP.21 Draft Instrument*, *supra* note 35, art. 1.5.
[61] *WP.36 Redraft*, *supra* note 35, para. 6 (revising art. 1(a)).
[62] *WP.36 Redraft*, *supra* note 35, para. 6 (introducing bracketed art. 2(1*bis*)).

A possible variant for article 1(a), which included the concept of article 2(1*bis*)'s attempted clarification, was also included in a footnote.[63]

For present purposes, it is noteworthy that the WP.36 Redraft definition includes a substantive 'internationality' requirement: In order to qualify for coverage, the sea leg was required to be international.[64] Although the small drafting group had no objection to that internationality requirement, a definition seems to be an inappropriate place in which to include it in the new convention. The need for an international sea leg is as much a part of the substantive requirements for coverage as the need for a sufficient connection with a Contracting State. The small drafting group accordingly decided that all of these requirements should be included together in article 2.[65]

The remaining additions proposed by the WP.36 Redraft relate more to the multimodal scope of the new convention, an issue that has been addressed elsewhere,[66] and not to the types to transactions that should be covered, the immediate issue here. The small drafting group nevertheless decided that, as it was necessary to revise article 1(a) in any event, the text should be made as clear as possible. The WP.36 Redraft definition could possibly be misread to limit the scope of the 'contract of carriage' to the sea leg, while simply noting that a contract to carry goods by sea could have incidental components covering obligations before or after the sea carriage. The portion of the WP.36 Redraft definition before the semicolon[67] could be misread as a complete definition in itself, and that would cover only the sea leg. The portion after the semicolon[68] could then be seen almost as an after-thought, permitting non-maritime incidental components that might not be viewed as fully part of the 'contract of carriage'. Although the Working Group, which has strongly endorsed 'maritime plus' multimodal coverage,[69] could not have intended this dismissive treatment of the inland portions of the contract of carriage, the importance of recognizing the multimodal aspects of the new convention makes it appropriate to have a less ambiguous definition. The core definition in article 1(a) was accordingly revised to read:

> 'Contract of carriage' means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. This undertaking must provide for carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage.[70]

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[63] This possible variant provided:

> Contract of carriage means a contract under which a carrier against the payment of freight undertakes to carry goods from a place in one State to a place in another State if:
>
> (i) the contract includes an undertaking to carry the goods by sea from a place in one State to a place in another State; or
> (ii) the carrier may perform the contract at least in part by carrying the goods by sea from a place in one State to a place in another State, and the goods are in fact so carried.
>
> In addition, a contract of carriage may also include an undertaking to carry goods by other modes prior to or after the international carriage by sea.

WP.36 Redraft, *supra* note 35, para. 6 n.14.

[64] For a more detailed discussion of this aspect of the subject, *see* Sturley, *supra* note 4, at 153–154 & nn.121–25.

[65] *See infra* notes 88–89 and accompanying text.

[66] *See, eg,* Michael F Sturley, *The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress*, 39 TEX. INT'L L.J. 65, 76–79 (2003); Gertjan van der Ziel, *Multimodal Aspects*, 2004 DIR. MAR. 907.

[67] *WP.36 Redraft*, *supra* note 35, para. 6 (art. 1(a)) ('Contract of carriage means a contract under which a carrier, against payment of freight, undertakes to carry goods by sea from a place in one State to a place in another State . . .').

[68] *Id.* ('[S]uch contract [ie the contract of carriage by sea] may also include an undertaking by such carrier to carry the goods by other modes prior to or after the carriage by sea.').

[69] *See, eg, Report of Working Group III (Transport Law) on the work of its eleventh session*, UNCITRAL, 36th Sess., para 239, U.N. Doc. A/CN.9/526 (2003) ('[W]ide support was expressed in the Working Group that the scope of application of the draft instrument should be door-to-door rather than port-to-port.'). *See also, eg,* Sturley, *supra* note 4, at 147.

[70] *Scope-of-Application Draft*, *supra* note 59, art. 1(a) (first two sentences).

The first sentence clearly defines the contract of carriage to govern the carrier's entire obligation, from the place of receipt (which may be a maritime port or an inland location) to the place of delivery (which may also be a maritime port or an inland location). The second sentence then adds the fundamental requirement that there must be a sea leg to justify the application of the new 'maritime-plus' convention, and clarifies that the contract may include multimodal elements. Although there must be a sea leg, the contract – and thus the new convention – governs the full multimodal carriage (if that is what the parties have agreed).

Finally, the six original draftsmen of the Scope-of-Application Draft thought that the language in article 2(1*bis*) of the WP.36 Redraft[71] was superfluous at best, or even dangerous. It responds to the fact that most contracts of carriage do not explicitly provide for how the goods will be carried on each leg of the journey. Even a contract to carry bulk goods from Rotterdam to New York may not specify sea carriage. An ocean carrier's bill of lading would generally name the vessel on which the goods are to be carried, thus creating an overwhelming implication that sea carriage was intended, but a freight forwarder's bill of lading may not be so specific. Of course, a court should quickly be able to determine from the nature of the goods, the agreed freight rate, and the facts of geography that the parties must have intended sea carriage rather than air carriage (the only possible alternative). But what about the shipment of a single container from Hamburg to Genoa? Although the very existence of an ocean carrier's bill of lading would create the implication that sea carriage was intended, a freight forwarder's bill of lading could be consistent with road, rail, or sea carriage. Proposed article 2(1*bis*) simply instructs a court that when a contract of carriage leaves open the means of carriage, the subsequent fact of actual sea carriage should prove that sea carriage was intended. But of course a contract explicitly providing for rail carriage does not become a contract for sea carriage simply because the carrier (or its subcontractor), in breach of the original contract, uses a ship rather than a train.

Most of the original draftsmen of the Scope-of-Application Draft thought that proposed article 2(1*bis*) was simply superfluous. Whether a contractual undertaking provides for carriage by sea is a matter of contract interpretation. The contract may provide for sea carriage explicitly or implicitly. Surrounding facts and circumstances may assist a court to determine the parties' intent. No court should have any trouble deciding that a contract to carry bulk goods from Rotterdam to New York 'provides for carriage by sea' even if the contract does not specify sea carriage. If there is any ambiguity in the parties' intent, no court should have any trouble recognizing that the actual performance is at least relevant evidence in determining what was intended. There should be no need to include provisions in the instrument instructing national courts how to interpret contracts.[72]

None of the original draftsmen saw any benefit to including the article 2(1*bis*) language, but some went further and saw it as positively dangerous. Although the details of this fear are beyond the scope of the present discussion, the central concern was that the proposal confused the contractual obligation with the actual performance. The entire focus of the draft instrument is contractual,[73] and it follows that the parties' intent at the time of contracting is what matters, not the actual performance (which might in any event be that of a performing party that had very little connection with either of the original contracting parties). At best, waiting until actual performance to determine whether the new convention will apply to a transaction makes it impossible for the parties to identify the governing law in time to comply

[71] *See WP.36 Redraft*, *supra* note 35, para. 6 (introducing bracketed art. 2(1*bis*)). The art. 2(1*bis*) text is quoted *supra*, text at note 62.

[72] In analogous circumstances, national courts have been fully capable of addressing the modes of transport that the parties intended under their contracts of carriage. *See, eg, Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 881–886, 1992 AMC 1171, 1179–87 (3d Cir. 1992) (addressing whether a contract of carriage from Taiwan to New York covered only sea carriage, via the Panama Canal, or both sea and rail carriage).

[73] *See, eg*, Sturley, *supra* note 4, at 145 & nn.50–52.

with it. Far worse is the risk that the wrong convention will be applied when the carrier or a performing party is forced to change plans in the middle of a transaction.

Whether the article 2(1*bis*) language is viewed as superfluous or dangerous, there was no reason to include it in the Scope-of-Application Draft. The small drafting group, however, felt that the language had been included in the WP.36 Redraft (albeit in square brackets) after discussion by the full Working Group,[74] and that it would exceed the mandate of the small group to delete a controversial provision without at least some guidance from the Working Group. The language was therefore repeated, still in square brackets without modification or endorsement, at the end of the article 1(a) definition, simply to preserve it for further discussion.[75]

Liner and non-liner service definitions (article 1)

As will be seen below,[76] the Scope-of-Application Draft includes aspects of the trade approach suggested at the London Seminar,[77] thus making it desirable to define the terms 'liner service' and 'non-liner service'.[78] In the short time available, it was not possible to study the different ways in which 'liner service' has been defined in analogous contexts, but it was thought that two aspects are common to most understandings of the term – a service that is generally available to the public at large and a service that operates on a regular schedule. The following tentative definition of liner service was accordingly included in the draft:

> 'Liner service' means a maritime transportation service that
>
> (i) is available to the general public through publication or otherwise; and
>
> (ii) is performed on a regular basis between specified ports in accordance with announced timetables or sailing dates.[79]

The definition is in square brackets to indicate that it is still tentative, and may need to be revised in light of further study. In the meantime, it serves as a place-holder, marking the need to include some definition of the term and suggesting, at least in general terms, what that definition might provide.

Whatever definition is ultimately accepted for 'liner service,' a definition of 'non-liner service' will follow directly.[80] For the moment, the draft contains the following language:

> 'Non-liner service' means any maritime transportation service that is not a liner service.[81]

It is worth noting that liner and non-liner services are mutually exclusive and exhaustive terms. Thus, the 'non-liner' trade is broader than the tramp trade. It would include, for example, services that are generally available to the public at large but that operate on an 'on-demand' basis rather than a regular schedule.[82]

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[74] *See Twelfth Session Report*, *supra* note 46, paras 71–74.
[75] *See Scope-of-Application Draft*, *supra* note 59, art. 1(a) (final sentence).
[76] *See infra* notes 115–120 and accompanying text.
[77] *See supra* text following note 28.
[78] The 'liner trade' and 'liner service' are thought to be synonymous.
[79] *Scope-of-Application Draft*, *supra* note 59, art. 1(– –).
[80] Defining 'liner service' (and thus 'non-liner service') was thought likely to be more successful than defining 'tramp trade'. In part, this is because the liner trade is more homogeneous than the tramp trade, thus making it easier to identify the defining characteristics. To an even greater extent, this is because an exclusion for the tramp trade would not be broad enough. Whichever of these two approaches is taken, special treatment would be necessary for the gap between the liner trade and the tramp trade. *See infra* text at notes 124–125. It is easier to exclude all of the non-liner trade, with certain exceptions, than it is to exclude all of the tramp trade with further exclusions in addition to that. *See infra* text at note 120.
[81] *Scope-of-Application Draft*, *supra* note 59, art. 1(– –).
[82] *See supra* notes 43–44 and accompanying text.

Geographic scope issues (article 2(1))

During its initial discussion of the three theoretical approaches,[83] the 'majority of the delegations favored the contractual approach'.[84] The small drafting group accordingly proceeded on the basis that the principal criterion for coverage under the new convention should be contractual, even if the documentary and trade approaches might supplement the contractual approach to compensate for its weaknesses.[85] Article 2 of the Scope-of-Application Draft therefore opens with the core proposition that 'this Instrument applies to contracts of carriage'.[86] But of course, the existence of a contract of carriage alone cannot be sufficient. For the new convention to apply, the contract must govern international transportation,[87] and it must have a sufficient connection with a Contracting State (ie a nation that has ratified the new convention).

The internationality requirement for the sea leg has already been mentioned here in conjunction with the definitions,[88] where I explained that the small drafting group felt that it should be included with the other geographic requirements in article 2.[89] A second internationality requirement applies to the overall contract of carriage, with the result that a shipment that starts and ends in the same country would not be covered by the Instrument even if the sea leg is international.[90] This second internationality requirement had been included in earlier UNCITRAL drafts,[91] but was omitted from the WP.36 Redraft. Believing that the omission was inadvertent, and that the overall internationality requirement should in any event be part of the instrument, the small drafting group restored the requirement to article 2.

The bulk of article 2 addresses the connection that a transaction must have with a Contracting State to justify coverage under the Instrument. Four lettered sub-paragraphs address alternative situations in which a sufficient connection is thought to exist. In substance, these four sub-paragraphs are taken directly from the most recent UNCITRAL drafts.[92]

Throughout article 2(1), efforts have been made to simplify and clarify. In the WP.36 Redraft, for example, the phrase 'specified either in the contract of carriage or in the contract particulars' is used to modify various places, such as the place of receipt and the port of loading. In an effort to simplify, the Scope-of-Application Draft instead uses the term 'contractual' (in square brackets, to focus the Working Group's attention on the change) to modify the places, along with a bracketed sentence at the end to note that the meaning is substantially the same.[93] The term 'contractual' is also added to the chapeau of article 2(1) to stress that the two internationality requirements (for the sea leg and the overall carriage) are to be judged by the requirements of the contract, not by the actual performance.[94] This is not only in keeping with the Working Group's preference for a contractual approach; it also

[83] *See supra* notes 20–29 and accompanying text.
[84] *Fourteenth Session Report*, *supra* note 14, para 89.
[85] *See supra* text at notes 37–38.
[86] *Scope-of-Application Draft*, *supra* note 59, art. 2(1).
[87] If a State wishes to apply the substantive rules of the new convention to its domestic shipments, it would of course be permitted to do so as a matter of domestic law.
[88] *See also* Sturley, *supra* note 4, at 153–54 & nn.121–25.
[89] *See supra* notes 64–65 and accompanying text.
[90] Thus, a shipment from Seattle to Honolulu would not be covered, even if the contract called for it to be trucked to Vancouver for ocean carriage to Honolulu. In that case, the sea carriage (Vancouver to Honolulu) would be international (and the Seattle to Vancouver land carriage would also be international), but the overall contract of carriage would be for transportation from one place in the United States to another place in the United States.
[91] *See WP.32 Draft Instrument*, *supra* note 35, art. 2(1); *WP.21 Draft Instrument*, *supra* note 35, art. 3.1.
[92] *See WP.36 Redraft*, *supra* note 35, para 6 (art. 2(1)(a)-(d)); *cf. WP.32 Draft Instrument*, *supra* note 35, art. 2(1); *WP.21 Draft Instrument*, *supra* note 35, art. 3.1.
[93] It may be possible to simply the draft even further, omitting the frequent repetitions of the word 'contractual,' if the bracketed sentence at the end could adequately express the concept.
[94] This distinction could be important in cases when something goes wrong and plans must be changed on short

enables the parties to know in advance whether the new convention will apply to a particular transaction.

Incorporating these various changes, article 2(1) of the Scope-of-Application Draft provides:

> Subject to Articles 3 to 5, this Instrument applies to contracts of carriage in which the [contractual] place of receipt and the [contractual] place of delivery are in different States, and the [contractual] port of loading and the [contractual] port of discharge are in different States, if
>
> (a) the [contractual] place of receipt [or [contractual] port of loading] is located in a Contracting State, or
>
> (b) the [contractual] place of delivery [or [contractual] port of discharge] is located in a Contracting State, or
>
> (c) [the actual place of delivery is one of the optional places of delivery [under the contract] and is located in a Contracting State, or]
>
> (d) the contract of carriage provides that this Instrument, or the law of any State giving effect to it, is to govern the contract.
>
> [References to [contractual] places and ports mean the places and ports provided under the contract of carriage or in the contract particulars.][95]

Nationality (article 2(2))

The Hague-Visby Rules introduced an explicit provision making the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person irrelevant to the scope of application of the Rules,[96] and the Hamburg Rules adopted substantially the same provision.[97] Substantially the same provision was therefore included in earlier UNCITRAL drafts.[98] Although there is no opposition to this provision in substance, some members of the small drafting group questioned whether it is still necessary. The Scope-of-Application Draft therefore places the provision in square brackets to flag this question for future discussion.[99] It may well be that this is a provision that is generally unnecessary but that serves a useful function in at least some countries. If this is true, and if the provision does no harm, it should be retained.[100]

Exclusions from coverage (article 3(1))

Because the contractual approach, standing alone, is too broad – sweeping in contracts of carriage that the Working Group agrees should not be covered by the new convention –

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notice. Suppose, for example, that a contract calls for an ocean shipment from Vancouver to Honolulu. The instrument should plainly apply to this international shipment involving an international sea leg. If something goes wrong at the last minute and the carrier must arrange for substitute carriage on a ship sailing from Seattle (trucking the goods from Vancouver to Seattle to catch the ship), the last-minute change in plans should not result in a change of governing law – even though the sea leg will not in fact be international. *Cf. Tessler Brothers (B.C.) v. Italpacific Line*, 494 F.2d 438, 440, 1974 AMC 937, 937 (9th Cir. 1974) (shipment for delivery in Vancouver diverted to Tacoma, Washington, because of '[l]abor trouble at the destination').

[95] *Scope-of-Application Draft*, *supra* note 59, art. 2(1).

[96] *See* Hague-Visby Rules art. 10.

[97] *See* Hamburg Rules art. 2(2).

[98] *See WP.32 Draft Instrument*, *supra* note 35, art. 2(2); *WP.36 Redraft*, *supra* note 35, para 6 (art. 2(2)); *WP.21 Draft Instrument*, *supra* note 35, art. 3.2.

[99] *Scope-of-Application Draft*, *supra* note 59, art. 2(2).

[100] The Working Group faced a similar situation with respect to the familiar 'catalogue of defenses' now found in article 4(2) of the Hague and Hague-Visby Rules. Most civil-law countries feel that this catalogue is unnecessary, and that the same results would follow from a general statement regarding the carrier's liability. Thus the catalogue was omitted in the Hamburg Rules. Several common-law countries, however, feel that the catalogue still has value. Because it does no harm in the civil-law countries, the Working Group decided to retain the catalogue for the benefit of those countries in which it still has value. *See, eg, Report of Working Group III (Transport Law) on the work of its tenth session*, UNCITRAL, 36th Sess., para 39, U.N. Doc. A/CN.9/525 (2002).

certain exclusions from coverage are necessary. Article 3, which supplements the contractual approach with elements drawn from the trade and documentary approaches, provides the exclusions that enable the system to work.

Article 3(1) starts with the traditional charter-party exclusion,[101] continues with a modest expansion of this traditional provision to exclude specific types of contracts that are in some ways comparable to charter parties, and concludes with a broad exclusion based on the trade approach to avoid coverage under the new convention for a wide range of transactions that do not justify the application of mandatory rules. All three of these exclusions are subject to some qualifications, however, to prevent them from excluding more than they should. Thus it is necessary to examine each of them in detail.

It will be helpful to start with the proposed language. Article 3(1) of the Scope-of-Application Draft provides:

> This Instrument does not apply to:
>
> (a) subject to Article 5, charter parties, whether used in connection with liner services or not; and
>
> (b) subject to Article 4, volume contracts, contracts of affreightment, and similar contracts providing for the future carriage of goods in a series of shipments, whether used in connection with liner services or not; and
>
> (c) subject to paragraph 2, other contracts in non-liner services.[102]

The qualifications are all found in subsequent provisions – in article 5 for the charter-party exclusion of article 3(1)(a), in article 4 for the somewhat comparable exclusion of article 3(1)(b), and in article 3(2) for the trade-based exclusion of article 3(1)(c). I will briefly note each of those qualifications here, discussing them in more detail in subsequent sections.

Charter parties. Article 3(1)(a) continues the well-established charter-party exclusion that was first recognized in the Hague Rules,[103] retained without modification in the Hague-Visby Rules,[104] most recently re-enacted in the Hamburg Rules[105] and included in all of the prior UNCITRAL drafts.[106] In view of article 3(1)(c)'s reliance on the trade approach, it was thought prudent to specify that the new convention does not apply to charter parties 'whether used in connection with liner services or not'.[107] Thus the exclusion covers not only traditional charter parties in the tramp trades, but also slot and space charters used in liner trades.

The term 'charter party' has not been defined, but there is little reason to think that this will be a problem. Charter parties have been excluded from mandatory law in essentially the same terms for over 80 years, and the lack of a definition has not created practical problems. Earlier UNCITRAL drafts sought to broaden the charter-party exclusion to cover 'similar agreements',[108] which might have made a definition more important (so that courts could better recognize in what respects the unspecified agreements should be 'similar' to a charter party). But the provision here does not go beyond the well-known exclusion, and thus further efforts to 'improve' it seem unnecessary.

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[101] *See* Hague Rules art. 5; Hague-Visby Rules art. 5; Hamburg Rules art. 2(3).
[102] *Scope-of-Application Draft*, *supra* note 59, art. 3(1).
[103] *See* Hague Rules art. 5.
[104] *See* Hague-Visby Rules art. 5.
[105] *See* Hamburg Rules art. 2(3).
[106] *See WP.32 Draft Instrument*, *supra* note 35, art. 2(3); *WP.36 Redraft*, *supra* note 35, para. 6 (art. 2(3)); *WP.21 Draft Instrument*, *supra* note 35, art. 3.3.1.
[107] The drafting of this clause might be improved, for it now gives the impression that charter parties are more commonly used 'in connection with liner services'. Perhaps it would improve the text to say 'whether used in connection with liner or non-liner services'.
[108] *See WP.32 Draft Instrument*, *supra* note 35, art. 2(3); *WP.36 Redraft*, *supra* note 35, para 6 (art. 2(3)); *WP.21 Draft Instrument*, *supra* note 35, art. 3.3.1.

Like the established exclusion, article 3(1) is qualified by a provision protecting third parties when a transport document or its electronic equivalent is issued under a charter party.[109]

Volume contracts. Earlier UNCITRAL drafts sought to broaden the charter-party exclusion to cover 'contracts of affreightment, volume contracts, or similar agreements'[110] (without explaining what was meant by 'similar agreements'). Article 3(1)(b) excludes all 'contracts providing for the future carriage of goods in a series of shipments',[111] which are often called 'contracts of affreightment' or 'volume contracts'. As a general rule, these agreements – like charter parties – are individually negotiated between sophisticated parties with comparable bargaining power, and thus do not create the risks that are thought to justify the application of a mandatory law. In addition, they are like charter parties in that transport documents are often issued for individual shipments, and these transport documents may govern third parties' rights against the issuing carrier.

The Scope-of-Application Draft treats these agreements in the same way that it treats charter parties. Article 3(1)(b) excludes them from coverage, just as article 3(1)(a) excludes charter parties. But this exclusion is qualified by a provision protecting third parties when a transport document or its electronic equivalent is issued under an agreement.[112]

It is important to stress here an important limitation on the Scope-of-Application Draft. In the short time available, neither the small drafting group nor the six delegations making the original Drafting Suggestion attempted to resolve the issues raised by the US proposal for the unique treatment of a particular type of contract that has been dubbed an 'Ocean Liner Service Agreement' or 'OLSA'.[113] Although additional requirements would need to be satisfied, an OLSA would qualify as a 'contract providing for the future carriage of goods in a series of shipments', and thus would be governed by article 3(1)(b) as currently drafted. When the Working Group resolves the OLSA issue, it may be necessary to revise article 3(1)(b) (and article 4) to conform with that resolution.[114]

Non-liner services. While paragraphs 3(1)(a) and (b) restate provisions that have long been included in the prior UNCITRAL drafts,[115] article 3(1)(c) introduces a new concept to resolve a problem that has long troubled the Working Group. From the beginning of the process, the Working Group has recognized that some transactions should be excluded from coverage that are similar to traditional charter-party transactions, even though they are not themselves covered by charter parties. Prior drafts have used the phrase 'similar agreements' to signal the existence of this problem,[116] but it has been impossible to define just what would be covered, or even to explain how the agreements were expected to be 'similar' to charter parties. It was common to note that they would typically be individually negotiated between sophisticated

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[109] *See infra* notes 134–140 and accompanying text (discussing *Scope-of-Application Draft*, *supra* note 59, art. 5).

[110] *See WP.32 Draft Instrument*, *supra* note 35, art. 2(3); *WP.36 Redraft*, *supra* note 35, para 6 (art. 2(3)); *WP.21 Draft Instrument*, *supra* note 35, art. 3.3.1.

[111] Article 3(1)(b), like article 3(1)(a), concludes with the clause 'whether used in connection with liner services or not'. The drafting of this clause might also be improved, *cf*. *supra* note 107, perhaps by substituting the clause 'whether used in connection with liner or non-liner services'.

[112] *See infra* notes 129–133 and accompanying text (discussing *Scope-of-Application Draft*, *supra* note 59, art. 4); *cf*. *supra* note 109 and accompanying text (noting the comparable qualification on the charter-party exclusion under *Scope-of-Application Draft*, *supra* note 59, art. 5).

[113] *See Preliminary Draft Instrument on the Carriage of Goods by Sea: Proposal by the United States of America*, UNCITRAL, U.N. Doc. A/CN.9/WG.III/WP.34, paras 18–29 (2003). *See generally* Sturley, *supra* note 4, at 142–43. There is not yet a consensus on how the instrument should treat OLSAs. *See supra* note 16.

[114] During the general session, the full Working Group discussed the OLSA proposal without resolving it. *See Fourteenth Session Report*, *supra* note 14, paras 97–104.

[115] *See supra* notes 106 and 110 and accompanying text.

[116] *See WP.32 Draft Instrument*, *supra* note 35, art. 2(3); *WP.36 Redraft*, *supra* note 35, para 6 (art. 2(3)); *WP.21 Draft Instrument*, *supra* note 35, art. 3.3.1.

parties with comparable bargaining power, but the concepts of 'individual negotiation', 'sophistication' and 'comparable bargaining power' are all too vague to be included in the text of a convention for the purpose of defining its scope.

At the London Seminar, a suggestion was made to solve the entire scope-of-application problem by covering only transactions in the liner trades, completely excluding all transactions in the non-liner trades.[117] Standing by itself, this proposal does not fully resolve the problem.[118] But the trade approach is much more effective at identifying the 'similar agreements' that are sufficiently like charter parties that they should be excluded from the mandatory application of the instrument. One of the easily defined characteristics shared by towage contracts, heavy lift contracts, and a wide range of other individually negotiated agreements between sophisticated parties with comparable bargaining power (including traditional charter parties) is that they are all used in the non-liner trades. Thus, excluding 'other contracts in non-liner services' is an efficient way of excluding the 'similar agreements' mentioned in prior UNCITRAL drafts.

Unfortunately the exclusion of *all* contracts in non-liner services turns out to be too broad. Although this exclusion should cover virtually all of the individually negotiated agreements between sophisticated parties with comparable bargaining power that the Working Group wishes to exclude, it would also sweep up some transactions (discussed below[119]) that are subject to the Hague or Hague-Visby Rules today – transactions that the Working Group wishes to govern. To preserve the continued application of mandatory law in these cases, the non-liner services exclusion is qualified by a provision covering transactions that are now governed by the Hague and Hague-Visby Rules.[120]

Qualifications on the exclusions from coverage (articles 3(2), 4, and 5)

As noted above, each of the three exclusions from coverage in article 3(1) standing alone would be too broad, excluding transactions from the scope of the instrument that the Working Group wishes to cover. It was therefore necessary to qualify each of the exclusions, thus limiting what would otherwise be its overly broad reach. Like the traditional charter-party exclusion itself, the limiting qualification on the charter-party exclusion is familiar. The limiting qualification on the exclusion for volume contracts is familiar in concept because it is analogous to the charter-party rule, and it is familiar in terminology because it is drawn from the Hamburg Rules. And just as the non-liner service exclusion is innovative in its approach while covering familiar ground to reach a predictable conclusion, so its limiting qualification will appear novel at first sight, although its effect is to reaffirm long-established coverage.

Article 3(2). The broad exclusion of article 3(1)(c) adopts the trade approach to avoid coverage under the new convention for a wide range of transactions that the Working Group agrees should not be subject to mandatory rules.[121] Most of the transactions affected by this exclusion would be completely non-controversial; there was no sentiment in the Working Group for covering towage contracts or heavy lift contracts. The only reason to address the issue at all is the fear that the broad definition of a contract of carriage under article 1(a) might inadvertently sweep in these non-liner transactions.[122] Excluding all contracts in non-liner services is an effective way to deal not only with towage contracts and heavy lift contracts but also with comparable arrangements that did not occur to the Working Group or that might arise in the future.[123]

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[117] *See supra* text following note 28.
[118] *See supra* notes 40–44 and accompanying text.
[119] *See infra* text at notes 124–125.
[120] *See infra* notes 121–128 and accompanying text (discussing *Scope-of-Application Draft*, *supra* note 59, art. 3(2)).
[121] *See supra* notes 115–120 and accompanying text.
[122] *See supra* notes 37–38 and accompanying text.
[123] *See supra* text following note 39.

Unfortunately, the simple expedient of excluding all contracts in non-liner services would also exclude some transactions that are currently governed by the Hague or Hague-Visby Rules,[124] and that the Working Group agrees should continue to be governed by the new convention.[125] In the gap between the liner and tramp trades, shipowners operate essentially as liner carriers without fully satisfying the requirements of the liner trade. For example, some carriers (such as those in the non-containerized reefer trade) offer what would otherwise be recognized as liner services except that they operate on an 'on-demand' basis rather than as a regularly scheduled service. But they issue traditional bills of lading (thus triggering the application of the Hague or Hague-Visby Rules), and the policy justifications for applying a mandatory law to them apply just as strongly is in the strict liner context.

To solve this over-breadth problem, the small drafting group concluded that it would be sufficient to restore the instrument's coverage to those transactions that are currently covered by the Hague or Hague-Visby Rules (making suitable allowance for sea waybills and other bill of lading substitutes, as well as for electronic commerce). Much of the Working Group's rationale for covering these transactions, after all, is that the new convention should not be inadvertently reducing the scope of its application. Article 3(2) therefore updates the documentary approach of the Hague or Hague-Visby Rules essentially along the lines that Professor Debattista proposed at the London Seminar.[126] Although this approach would be ineffective as the sole criterion for the new convention's scope of application, it effectively captures the discrete class of transactions that the trade approach could not handle.

Taking all of these considerations into account, the text of article 3(2)[127] proposed by the small drafting group provides:

> This Instrument applies to contracts of carriage in non-liner services under which the carrier issues a transport document or an electronic record that:
>
> (a) evidences the carrier's or a performing party's receipt of the goods; and
>
> (b) evidences or contains the contract of carriage,
>
> except in the relationship between the parties to a charter party or similar agreement.[128]

The final clause of article 3(2) is necessary to preserve traditional treatment of charter parties, ensuring that the instrument will not apply to the parties to a charter party even if a bill of lading issued under the charter party has been negotiated to a subsequent holder (and thus evidences the contract of carriage between the carrier and that holder).

Article 4. The exclusion in article 3(1)(b) analogizes 'volume contracts, contracts of affreightment, and similar contracts providing for the future carriage of goods in a series of shipments' to charter parties, and treats them in essentially the same way.[129] Just as the traditional charter-party rule provides special treatment for individual bills of lading issued under charter parties, so article 4 provides a special rule for the individual shipments under a volume contract. The proposed text provides:

> If a contract provides for the future carriage of goods in a series of shipments, this Instrument applies to each shipment in accordance with the rules provided in Articles 2, 3(1)(a), 3(1)(c), and 3(2).[130]

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[124] *See supra* notes 43–44 and accompanying text.
[125] *See supra* notes 15–17 and accompanying text.
[126] *See supra* note 30 and accompanying text.
[127] It might be worth considering whether this exception to article 3(1)(c)'s exclusion should be a paragraph within article 3, as it appears in the current draft, or whether it should be a separate article. The exceptions to the article 3(1)(a) and (b) exclusions appear as separate articles. *See infra* notes 129–140 and accompanying text (discussing *Scope-of-Application Draft*, *supra* note 59, arts. 4 & 5). Of course, all of these issues will need to be reconsidered when the proposal is inserted in the draft instrument. *See supra* text following note 59.
[128] *Scope-of-Application Draft*, *supra* note 59, art. 3(2).
[129] *See supra* notes 110–112 and accompanying text.
[130] *Scope-of-Application Draft*, *supra* note 59, art. 4.

The language is taken directly from a substantially identical provision in each of the prior UNCITRAL drafts,[131] which was based in turn on article 2(4) of the Hamburg Rules.[132]

Once again,[133] it is important to stress here that the Scope-of-Application Draft does not address the issues raised by the U.S. OLSA proposal. When the Working Group resolves the OLSA issue, it may be necessary to revise article 4 (and article 3(1)(b)) to conform with that resolution.

Article 5. The exclusion in article 3(1)(a) is familiar because it continues the 80-year-old charter-party exclusion established in the Hague Rules.[134] Its limiting qualification is equally familiar, also being based on the approach established in the Hague Rules.[135] Article 5 of the Scope-of-Application Draft has been updated, however, and differs not only from the corresponding provisions in the existing conventions[136] but also from the corresponding provisions in earlier UNCITRAL drafts.[137] The proposed text provides:

> If a transport document or an electronic record is issued pursuant to a charter party or a contract under Article 3(1)(c), then such transport document or electronic record shall comply with the terms of this Instrument and the provisions of this Instrument apply to the contract evidenced by the transport document or electronic record from the moment at which it regulates the relationship between the carrier and the person entitled to rights under the contract of carriage, provided that such person is not a charterer or a party to the contract under Article 3(1)(c).[138]

This proposal broadens the protection for third parties in two ways. Most significantly, it applies to any transport document or electronic record issued under a charter party or comparable arrangement, whereas some jurisdictions have limited the reach of the corresponding provisions in the Hague, Hague-Visby, and Hamburg Rules to *negotiable* bills of lading. Professor Honka highlighted this issue in his final discussion paper,[139] so before the small drafting group met the Working Group had considered the available options and concluded that some transport document or electronic record must be issued for this provision to apply but that the transport document or electronic record need not be negotiable.[140]

Article 5 also broadens the protection for third parties because it applies not only in the charter-party context but also in the situation in which a transport document or electronic record is issued under some other contract in the non-liner service, and this transport document or electronic record governs third-party rights. This expansion of the rule is likely to be most significant in making it unnecessary to define charter parties (because essentially the same rules will apply whether or not a particular document qualifies as a charter party).

The final proviso in article 5 ensures that its limitation on articles 3(1)(a) and (c) does not swallow the general rule. Under article 5, the transport document or electronic record issued under a charter party or similar agreement is subject to the new convention only to the extent that it governs relations between the issuing carrier and a third party. Relations between the carrier and the shipper will continue to be governed by their contract.

Conclusion

For most of the life of the Transport Law project, going back to the early work of the CMI, there has been a widely shared understanding about the types of transactions that should and

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[131] *See WP.32 Draft Instrument*, *supra* note 35, art. 2(5); *WP.36 Redraft*, *supra* note 35, para. 6 (art. 2(5)); *WP.21 Draft Instrument*, *supra* note 35, art. 3.4.
[132] *See* Hamburg Rules art. 2(4).
[133] *Cf. supra* notes 113–114 and accompanying text; *supra* note 16.
[134] *See* Hague Rules art. 5.
[135] *See* Hague Rules arts. 1(b).
[136] *See* Hague Rules art. 1(b); Hague-Visby Rules art. 1(b); Hamburg Rules art. 2(3).
[137] *See WP.32 Draft Instrument*, *supra* note 35, art. 2(4); *WP.36 Redraft*, *supra* note 35, para 6 (art. 2(4)); *WP.21 Draft Instrument*, *supra* note 35, art. 3.3.2.
[138] *Scope-of-Application Draft*, *supra* note 59, art. 5.
[139] *See supra* note 13 and accompanying text.
[140] *See Fourteenth Session Report*, *supra* note 14, paras. 91–92, 96.

should not be included. At last year's London Seminar, a consensus on the instrument's substantive coverage seemed to have developed, and this was confirmed at the UNCITRAL Working Group's Vienna session in December. But the problem of implementing that consensus remained. Three plausible approaches had been suggested. Although each had its advantages, any one of them, standing alone, would have been inadequate.[141]

The hybrid approach that emerged in Vienna is not simply a compromise among competing alternatives.[142] It instead represents an elegant solution to a perplexing puzzle that takes advantage of the strengths of each of the three individual approaches while minimizing their weaknesses. For example, the hybrid solution deals with the contractual approach's overly broad coverage and inability to define which transactions should be excluded by using the documentary and trade approaches to define the exclusions. It deals with the documentary approach's inability to define all the transactions that should be included by relying on documents primarily to identify some, but not all, of the covered and excluded transactions. It deals with the problems of distinguishing trades at the margin by using the trade approach primarily to exclude transactions that do not fall at the margins, allowing the documentary approach to do most of the work for close cases at the margins. And it deals with the conceptual problems of the documentary and trade approaches by using the contractual approach as the fundamental criterion for coverage under the instrument.

The hybrid proposal now before the Working Group starts with the contractual approach that makes the most conceptual sense to most of the delegates. It then uses the trade approach to solve a long-standing problem under the contractual approach. Finally, it uses the documentary approach to correct the major weakness of the trade approach, and to address the inability of the trade approach to make close calls at the margin. This innovative combination of contracts, trades, and documents appears to represent a practical solution to a vexing problem at the very heart of the proposed new convention.

Although the Working Group has 'agreed that the redraft represent[s] a sound text upon which to base future discussions on scope of application, once further reflection and consultations ha[ve] taken place',[143] the work on this subject is by no means done. During the present period of reflection and consultation, it remains to be considered whether the proposal adequately provides for the various possibilities that might be imagined. Refinements will certainly be necessary to conform the proposal to the conclusions reached in future discussions,[144] and may well be necessary on issues that could not be fully considered in Vienna.[145] The small drafting group has already identified some drafting issues for further consideration,[146] and further drafting improvements will no doubt be possible.[147]

Despite the work that remains to be done, and the continuing need for caution whenever predictions are made in this field,[148] the Scope-of-Application Draft is another encouraging development in the UNCITRAL Transport Law project. Not only does it represent a solution to a troubling problem that needed to be solved; it well illustrates the Working Group's ability to reach solutions to troubling problems.

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[141] *See supra* text at note 31 (discussing the weaknesses of the documentary approach); *supra* text at notes 35–38 (discussing the weaknesses of the contractual approach); *supra* text at notes 40–44 (discussing the weaknesses of the trade approach).

[142] The three alternatives did not in any event represent competing values or substantive positions for which a compromise would be appropriate. Rather, they each represented a different route to an agreed destination.

[143] *Fourteenth Session Report*, *supra* note 14, para 109.

[144] *See supra* notes 113–114, 133 and accompanying text.

[145] *See, eg*, *supra* notes 76–82 and accompanying text.

[146] *See, e.g.*, *supra* text at notes 75, 93–94, 99.

[147] *See, eg*, *supra* notes 107, 111, 127.

[148] *See* Sturley, *supra* note 4, at 154.