Report of UNCITRAL Meetings in Vienna, October 2007

By
Chester D. Hooper
and Vincent M. DeOrchis

Working Group III (Transport Law) of the United Nations Commission on International Trade Law (UNCITRAL) completed the third reading of its proposed new convention, WP.81, at its October meeting. We started the discussion at Article 42, "Evidentiary effect of the contract particulars," and went through to the end of WP.81. We shall attempt to describe the highlights of those discussions.

The reports of this session of the Working Group are being sent to the Secretariat to prepare the next draft. The next draft should be circulated before the next Working Group meeting, which will last from January 14 through 25, 2008. That meeting should be the last Working Group meeting. The Draft Convention will be sent to the UNCITRAL Commission in New York for a meeting in the summer of 2008. After approval by the Commission, the Draft Convention will be sent to the General Assembly in the fall of 2008 for approval. The Secretary of UNCITRAL reported that the General Assembly has received reports from UNCITRAL and should receive and approve of the Instrument in the fall of 2008.

Article 49

The Working Group discussed Article 49 extensively.

Article 49(c) would allow a carrier to deliver cargo against the surrender of only one original bill of lading when more than one original is issued. The other originals would stand void.

Article 49(d), (e), (f), and (g) concern delivery of cargo when a bill of lading is not available for surrender. The Working Group agreed that those sub-paragraphs should be refined for the next meeting in January. If agreement can be reached on the proper wording, it might not be necessary for a carrier to demand a letter of indemnity from a consignee before delivering cargo without surrender of the bill of lading. The Working Group also discussed a proposed amendment, which would specifically allow a carrier to demand a letter of indemnity before delivering cargo without taking up the bill of lading. The wording of the proposal drafted by Denmark and The Netherlands, working paper 94 (WP.94), was generally accepted. It will change the wording of Article 49(g), which carriers had criticized.

Articles 50 and 51

Article 50 concerns delivery of goods and unclaimed goods. It gives a carrier several options for dealing with unclaimed cargo, including sale of the cargo (to the extent permitted by local law).

Articles 52 - 58

Articles 52 through 58 concern rights of the controlling party. Those sections will be kept generally as written in WP.81. The only comments of note were that in Article 54 the carrier should be reimbursed for “reasonable” or "foreseeable” expenses as a result of following any instructions from the controlling party, and that the carrier must “diligently” execute the instructions, meaning that the carrier should check that the instructions are authentic.

Article 62

The Working Group extensively discussed Article 62, the limits of liability. Indeed a second session was added during the second week to revisit the issue. All countries that have adopted the Hamburg Rules (which set the limit at 835 SDRs per package or 2.5 SDRs per kilo, whichever is greater) want "Hamburg plus" limits. Several countries suggested 1200 SDRs per package and 8 SDRs per kilo. Those that are presently parties to the Hague Visby Rules generally want "Hague Visby plus" or Hamburg. Only seven countries — China, Greece, Japan, Korea, Singapore, the United Kingdom, and the United States — were in favor of Hague Visby. The United States made it clear that the limitation had to be part of a basket of other changes, including the removal of articles 62(2), 99, and most importantly, perhaps, the proposal referred to as "article 26 bis," which would have allowed countries essentially to opt out of the convention in favor of their own domestic law that is applied to inland carriage.

After two days of hard negotiations, the Working Group generally agreed that the Hamburg limits of liability could be used and that inland limits under various international conventions or national law would not be used even when the location of the cause of damage is unknown. Unfortunately, neither the P & I Clubs nor the cargo underwriters brought any "evidence" of the value of present-day cargos and the effect of the limitation limits on those values. Although delegations argued that over 90% of all cargos are covered by the Hague Visby Limits, and over 95% by Hamburg, many countries were unconvinced (or simply found the argument to be irrelevant). It was also unclear whether the average value of maritime cargoes had increased, decreased, or remained steady during the 30 years since Hamburg was written. A number of countries announced that a "political" statement needed to be made for their countries' governments to increase the limitation

amount, regardless of what the actual value of cargos may be. It was noted that CMR, Montreal, and other conventions all have much higher weight limits than Hague Visby. In the end, when the United States was willing to consider values up to Hamburg (with a number of other countries, including China and Korea), there appeared to be a developing consensus that articles 99, 62(2), and so-called "26 bis" would all be removed. The Working Group will further discuss the matter at the January 2008 meeting. Some countries have stated that they want to link the limitation to the volume contract provisions being sought by the United States.

Jurisdiction Chapter 15

The Working Group agreed to keep the jurisdiction chapter as written in WP.81.

Article 78-80. Arbitration

The Working Group agreed that an Expert Committee will recommend modifications to Article 79. It seems likely that Article 79(2)(a) will ultimately be deleted. The Working Group retained Article 79(1) as worded in WP81.

The Working Group agreed to an "opt in" procedure for the Jurisdiction Chapter as well as for the Arbitration Chapter. The Group agreed to Article 77, Variant B and Article 81, Variant B. Many nations do not want to agree to the jurisdiction or arbitration provisions urged by the United States. The nations that do not agree will simply decline to opt in to one or both chapters and thus will not be governed by the chapter or chapters that they do not accept. Instead, they will let domestic law apply. In addition, the EU members may not ratify a treaty that includes a jurisdiction provision unless they obtain the consent of the European Commission. If the Convention were to include a jurisdiction provision, no member of the EU could ratify the treaty if there is substantial opposition within the EU.

This situation will create differences between the laws of the nations that opt in and those that do not. The U.S. delegation simply could not persuade many nations to abandon their insistence on freedom of contract in recognizing all choice-of-forum and arbitration clauses. That situation will not, however, prevent a U.S. court from upholding the jurisdiction and arbitration provisions in the United States. The State Department has made it clear that the U.S. government intends to opt in to both chapters. In short, once the Convention is ratified by the United States, the "anti-*Sky Reefer*" provisions promoted by the U.S. MLA will be enforceable by U.S. judges. For countries that do not opt in, the situation will be no different than it is now.

Article 65. Time for Suit

The Working Group agreed to keep the two-year period essentially as drafted in WP.81 (with a few technical changes to address conceptual problems in some civil-law systems).

Article 97. Number of Nations Necessary to Ratify Before the Convention Will Enter in Force

The Working Group discussed this question at great length. The proposed numbers ranged from a high of 30 (first suggested by FIATA) to a low of "three to five" (mentioned by the United States). It would not surprise us if ten were the number eventually adopted.

4879593_v4