

**Report of MLA Delegates, Chester D. Hooper
And Vincent M. DeOrchis, to UNCITRAL
Working Group III - Vienna, January 2008**

Working Group III (Transport Law) of the United Nations Commission on International Trade Law (UNCITRAL) finished the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea during a two week meeting in Vienna in January 2008. The UNCITRAL Commission reviewed the Convention in New York from June 16 through June 26, 2008. In January, the Working Group reviewed every article in the Convention as drafted in WP.101 and reached agreement on the amount of the package or weight limitation, volume contracts (service contracts) provisions, the number of nations necessary to ratify the Convention before it goes into effect, and the final wording of the jurisdiction and arbitration provisions. The same delegates met as the Commission in June and reviewed the entire Convention, and made some changes. This report will report on the January and June meetings.

Meeting of Working Group III in January 2008:

Limitation

This provision required considerable time and extensive negotiation. It was finally agreed that the Carrier's liability would be limited to 875 SDRs per package or 3 SDRs per kilo, whichever is greater.

China was particularly disturbed by these amounts, which they considered to be too high. They tried, but were not able, to reopen these discussions in June.

Volume (or Service) Contracts

Our industry, both carriers and shippers, would like the Convention to govern volume contracts in an essentially non-mandatory fashion.

France, Australia, and some other nations feared that the ability of a volume contract to derogate from the terms of the Convention would provide a loophole through the Convention that would provide carriers with an ability to force lower liability provisions on cargo interests through contracts of adhesion. We reached a settlement with those nations on the definition of volume contracts and when the terms of volume contracts may derogate from the Convention.

The definition of volume contract is:

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

Article 1(2)

The derogation provision will read as follows:

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

(a) The volume contract contains a prominent statement that it derogates from this Convention;

(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

(d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

3. A carrier's public schedule of prices and services, transport document, electronic transport record, or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document, or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

Article 80.

The sections of the Convention from which volume contracts may not derogate are identified in Article 80(4) above. They concern the duty to exercise due diligence to make and keep the ship, but not necessarily the holds or containers, in seaworthy condition; the shipper's obligation to provide information, instructions, and documents; special rules on dangerous goods; and any event that would cause the carrier to lose the benefit of limiting its liability.

Number of Nations Necessary to Ratify the Convention Before It Goes Into Force

We had hoped to require only 10 nations to ratify the Convention, but the Working Group wanted 20 nations. The Convention will go into force one year after the twentieth nation ratifies it. Many if not most nations are waiting for the United States to decide whether to ratify the Convention. When the United States ratifies it, many nations will probably follow suit.

Jurisdiction and Arbitration

The Convention contains jurisdiction and arbitration provisions, which nations may choose to opt into when they ratify the Convention or at a later date. The opt in provisions are necessary for two reasons.

(1) The members of the European Union (EU) may not negotiate jurisdiction provisions. Only the European Commission (EC) may negotiate jurisdiction provisions. No member of the EU may ratify a treaty containing jurisdiction provisions without the approval of the EC. The opt in provisions would allow EU members to ratify the Convention without waiting for the EC to approve the jurisdiction provisions. We do not know whether the EC will ever approve the jurisdiction provisions.

(2) Many nations did not want any jurisdiction or arbitration provisions in the Convention. These provisions are probably in the Convention only because of strong urging by the United States. Many nations saw no need to help the United States solve its domestic Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 199, 1995 AMC 1817 (1995) problem.

The result we achieved will solve the Sky Reefer problem in large part. Even if a bill of lading contained a choice of forum clause, cargo interests could start suit in the place of origin, the first port of loading, the carrier's principal place of business, the last port of discharge, or the place of destination. Article 66. If the bill of lading or other document contained a choice of

forum clause, cargo interests would have a choice of commencing suit at that place, but would not be required to do so. There are certain exceptions to this clause, which have been discussed at previous MLA meetings. The provisions will not, of course, apply to charter parties because the Convention will not govern charter parties. Article 6(1). The provisions will also not apply to the parties to volume contracts. Article 67(1). Parties to volume contracts may bind third party bill of lading holders to a volume contract choice of forum clause if the choice is one of the above places and the bill of lading holder is given notice that a choice of forum clause governs. Article 67(2).

The arbitration provisions are similar. Article 75. Cargo interests may demand arbitration in any of the five places listed above even though the bill of lading contained an arbitration clause for another place. As in the jurisdiction provisions, a plaintiff holding a bill of lading with an arbitration clause could also choose the place of arbitration listed in the bill of lading. Article 75(2). As a practical matter, it is doubtful that carriers will adopt arbitration provisions because of the lack of arbitration systems in so many ports of the world.

Charter parties may, as they do now, contain arbitration clauses, because charter parties are not governed by the Convention. Charter parties may extend the arbitration clause to holders of charter party bills of lading as they can in many U.S. circuits now, by specifically incorporating by reference the terms and conditions of the charter party including the arbitration clause into the bill of lading. Article 76(2).

Meeting of the UNCITRAL Commission in June 2008:

The same delegates who had comprised Working Group III comprises the Commission for the discussion of this Convention.

We again reviewed the entire Convention and made minor changes to it. Two articles were deleted. Their deletion changed many article numbers and cross references to them.

The Netherlands offered to host a signing ceremony in Rotterdam in September 2009. That offer was accepted by the Commission. The Convention will probably be known as the Rotterdam Rules.

We understand that the Convention will be presented to the General Assembly of the United Nations on October 20, 2008. If the General Assembly approves it, and we think it will, the Rotterdam Rules will be signed in Rotterdam in September 2009, and will then be open for ratification by nations.

Our State Department has told us that the September 2009 signing date will not delay the process. It will take that long for our State Department to get authority to sign it.

All nations with the possible exception of China agree that the Rotterdam Rules are a fair compromise. No nation or non-government organization is pleased with every article in the Convention, but almost all nations and NGOs are satisfied with the entire package.

We think that once the United States ratifies the Rotterdam Rules, the 20 nations necessary to place the Rotterdam Rules into force will ratify them. We should consider including in the United States implementing legislation a provision that would apply the Rotterdam Rules to our coastal trade and inland waterways in addition to our foreign trade.