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THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

Committee on Bills of Lading

Summary of the Special Report of the Committee on Bills of Lading With Regard to the UNCITRAL Draft Convention on Carriage of Goods by Sea to be Considered at the Annual Meeting, May 6, 1977.

By JOHN C. MOORE,
Chairman

I. BACKGROUND.

During its meeting in New York April 12 to May 7, 1976, the United Nations Commission on International Trade Law (UNCITRAL) produced the final draft of a Convention on the Carriage of Goods by Sea, which, if adopted, will take the place of the Hague Rules of 1924. UNCITRAL has invited the governments of all member nations and certain other bodies in a position to respond to submit comments by July 1, 1977. The CMI is one of the bodies having received an invitation to comment.

The CMI Executive Council, during its Brussels meeting March 30, 1977, voted to appoint a Working Party of six, of which John C. Moore, the Chairman of your Bills of Lading Committee, is one. The Working Party will hold its first meeting at Amsterdam on May 12, 1977 and will make recommendations to the CMI Executive Council, whether or not the position adopted at the 1974 Hamburg Conference should be confirmed. The Executive Council, which will meet on June 17, 1977, will, in turn, instruct President Berlingieri how to respond to UNCITRAL on behalf of the CMI prior to the July 1 deadline. It is not yet clear whether the full Sub-Committee on Bills of Lading will be reconstituted; that decision will be made at the June 17th meeting of the Executive Council.

In accordance with instructions received from President Owen, the Committee on Bills of Lading prepared a special report on the UNCITRAL Draft Convention. That report contains a detailed

study of the Convention. Its length (35 pages) does not permit circulation to the membership at large; however, copies will be available to those attending the May 6 meeting in New York. They may also be obtained on application to John C. Moore, Chairman of the Committee on Bills of Lading, One State Street Plaza, New York, New York 10004. It is requested that anyone requesting copies send Mr. Moore a gummed label for the convenience of his Secretary.

The members' attention is also directed to (1) the report of the Committee on Bills of Lading of November 5, 1975 (MLA Document #591, pp. 6448-6457), which contains comments on an earlier UNCITRAL Draft against the background of the Hague Rules and the Visby Amendments, and (2) Professor Joseph C. Sweeney's 5-part article, "The UNCITRAL Draft Convention on Carriage of Goods by Sea" in 7 *Journal of Maritime Law and Commerce,* pp. 69, 327, 487 and 65, and in 8 *Journal of Maritime Law and Commerce,* p. 167.

The Committee on Bills of Lading, after having carefully studied the Draft Convention, reiterated the Association's earlier position that the Hague-Visby Rules represent a practical commercial regime for the regulation of the rights and liabilities of cargo and carrier in the international carriage of goods by sea, and that, therefore, the proposed UNCITRAL Convention is neither necessary nor desirable. Nevertheless, in an effort to be helpful to UNCITRAL and to the U.S. Government, the Committee studied the Draft Convention in depth and commented on it, where appropriate, in its Special Report.

II. Major Changes and Comment.

Period of Responsibility of the Carrier.

The "tackle to tackle" rule of the Hague Rules would be abolished and the period of responsibility of the carrier extended to cover the period during which the goods are in the charge of the carrier or in the charge of his servants, agents or other persons acting pursuant to his instruction. Although this approach is not dissimilar to that of the Harter Act, the Convention language does not adequately pinpoint the time when the goods become the responsibility of the carrier. Also, if the Convention applies to combined transport, which is not altogether clear, the language attempting to define the time limits of the carrier's responsibility may be rather out of step with reality.

III. Basis of Liability.

Article 5 is the basic section defining liability of the carrier. It substitutes language describing a general standard of carrier liability for the specific language of the Hague Rules. Under this Article, if the occurrence causing loss takes place while goods are in the carrier's charge, the carrier is liable:

> "unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

On its face, the Convention abolishes the traditional defenses provided by the Hague Rules, the only exceptions to liability being special rules with respect to fire, live animals, losses resulting from measures to save life and property, or for dangerous cargoes. In reality, however, the only traditional defenses that would be effectively abolished are the error in navigation and management defenses. All other Hague Rules defenses, such as Perils of the Sea, Act of God, Act of War, strikes, insufficiency of packaging, etc., would appear still to be available, because they are, by definition, causes over which the carrier may have no control, and which, therefore, would not likely be caused by the negligence.

Hague Rules Article 4(2)(q), providing for exoneration for losses resulting from "any other cause arising without the actual fault and privity of the carrier", operates similarly to the UNCITRAL Draft proposal. Article 4(2)(q), however, has been infrequently invoked because of the obvious difficulty in proving a negative, i.e., the absence of negligence. To the extent that the UNCITRAL Draft is similar to the Hague Rules defense of due diligence, the results of reported cases on that defense in this country are overwhelmingly in favor of cargo. Consequently, the UNCITRAL Draft seriously weakens the position of the carrier in case of cargo loss or damage in that it tends to destroy the delicate balance of risk distribution between those insuring cargo interests and those insuring carrier interests.

In the case of loss caused by fire, the burden of proof is shifted from the carrier to the cargo owner. It may reasonably be anticipated that courts are apt to find ways and means to reverse the burden. On the other hand, the fire exception may well carry too far in that it appears to excuse a fire resulting from a non-negligent

cause, even though it spread due to a deficiency on board the ship, for instance, absence of fire fighting equipment.

IV. Delay.

Delay was not expressly covered by the Hague Rules. Therefore, the Convention, for the first time, imposes liability for delay on the carrier. Delay occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage (1) "within the time expressly agreed upon," or (2), "in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case." Loss or damage resulting from delay are not defined in the Convention. In particular, it is not clear to what extent and under what circumstances any conceivable economic loss is intended to be included, in addition to physical damage. Likewise, although the draft language would appear to make the consideration of liability for delay distinct from the concept of deviation, its broadness may allow courts to consider the deviation principle as a factor.

The Committee believes that the delay provision of the Convention would be litigation-producing by its generality. It recommends that there should be no delay claim, unless the carrier fails to deliver the goods by a definite date agreed upon on the face of the Bill of Lading, if any, or prominently referred to in the contract of carriage, when no bill of lading is issued. If the carrier fails to deliver by a contractually agreed date, he is liable, whether he acted reasonably or not.

The Committee also believes an attempt should be made to define "loss resulting from delay". If no agreement can be reached, UNCITRAL should consider use of a limitation formula which would provide damages in all cases of delay. At present, the provisions concerning delay are scattered in various articles of the Convention. It might well be helpful to bring all such provisions into a single article.

V. Limits of Liability.

The Convention provides that the liability of the carrier for loss of or damage to goods "shall be limited to an amount equivalent to ( ) units of account per package or other shipping unit or ( ) units of account per kilogram of gross weight of the

goods lost or damaged, whichever is the higher." (An alternative article would base this only on weight.) The unit of account is still to be determined, both as to amount and description. A Subcommittee of the State Department's Industry Advisory Group of Private International Law has commissioned the Bureau of the Census to extract the statistics on U.S. foreign trade over the past 10 years for exports and imports by weight and by value. The Bureau's report has not been made public to date.

Where a container, pallet or similar article of transport is issued to consolidate goods, and package or other shipping units enumerated in the Bill of Lading as packed in such article of transport shall be deemed packages or shipping units; otherwise the goods in such articles of transport shall be deemed one shipping unit. It would appear that this provision is in line with the Visby Amendments.

VI. Loss of Right to Limit Liability.

The Convention provides that the carrier shall lose his right to limit liability if he causes loss, damage or delay in delivery intentionally, or recklessly and with knowledge that such loss, damage, or delay in delivery would probably result. In addition to actions or omissions by the carrier himself, loss of the right to limit likewise occurs in case of fault of the carrier's *employees while exercising supervisory authority,* or in the case where loss or damage occurs in the handling or taking care of the goods, by *any employee, including any member of the carrying vessel's crew.*

Although it does not specifically say so, the Convention, by providing that the carrier may lose his right to limit with respect to certain actions or omissions by his *employees,* would appear to leave inviolate the carrier's right to limit where the damage is due to any action or omission of his *servants* or *agents.* The Convention does not make a distinction between servants and agents on the one hand, and independent contractors on the other, which is important under American law, but apparently not under the law of most other states.

VII. Limitation of Actions.

The Convention substitutes a limitation period of two years for the one year period of the Hague Rules.

VIII. JURISDICTION.

Article 21 of the Convention, after setting forth a "jurisdictional catalogue" in sub-section 1, specifically provides in sub-section 2 that jurisdiction shall lie in the courts of any port at which the carrying vessel or some other vessel of the same ownership may have been lawfully arrested. In the case of the arrest of the vessel, the defendant (or claimant) may compel the plaintiff to transfer the case to one of the jurisdictions set out in sub-section 1, provided the defendant (or claimant) first gives security sufficient to secure payment of any judgment subsequently to be awarded in favor of plaintiff.

IX. ARBITRATION.

The Convention permits the parties to the contract of carriage to agree in writing that any dispute that may arise relating to carriage of goods under the Convention shall be referred to arbitration. The carrier is prohibited from invoking a charter party arbitration provision against the holder of a Bill of Lading, who acquired it "in good faith". It appears that the party whom the Convention is trying to protect is one who acquired a bill of lading without notice of the arbitration provision. "Good faith" being a term of art depending upon factors other than notice of an arbitration clause, the Committee feels that the Convention should be changed accordingly.

X. GENERAL AVERAGE.

Article 24(1) of the Convention corresponds with Article 5 of the Hague Rules and continues to leave the adjustment of general average to the provisions of the contract or of national law. In contrast to the Hague Rules, however, Article 24(2) deals explicitly with the carrier's right to recover general average contributions from cargo by conditioning this right upon the carrier's freedom from liability for loss of or damage to the goods under the Convention's provisions. (Interestingly enough, Article 24 does not mention delay, although it is clearly a basis for liability under Article 5). By specific cross-reference, Article 24(2) also makes it clear that the two year time for suit period of Article 20 does not apply to general average.

It is believed that under the Convention, the carrier's actual right to compel general average contributions from cargo will not be influ-

enced so much by Article 24, but by the elimination of such defenses as error in navigation or management in Article 5. No doubt, situations in which general average contributions would be recoverable from cargo will thereby become fewer, with the result that the carrier's insurance costs will go up.

NOTE: This summary has been prepared, by direction of President Owen, for the purpose of giving immediate notice to the Membership of the existence of the above-mentioned Special Committee Report. Full credit is given to Manfred W. Leckszas for his help in preparing this Summary but the responsibility is mine and, since time did not permit their consultation, no error or omission can be ascribed to any other member of the Committee.

J. C. M.