

**CONCERNS ABOUT
VOLUME CONTRACTS**

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Of great concern is the fact that the new Convention departs dramatically from existing treaties--largely in effect worldwide since the 1930's--because for the first time it permits carriers to opt out of the Convention liability scheme and in theory to be subject to very limited liability by virtue of entering into so-called "volume contracts" with particular shippers.¹ For this reason, European shippers have strongly opposed the new proposed Convention. Since the vast majority of liner cargo already moves under similar service contracts, the Volume Contracts exception is likely to be the Convention's most important provision, potentially engulfing, in practice, the rest of it.

There are several reasons, beyond the recent unhappy outcomes associated with financial deregulation, why suddenly now allowing deregulated shipping liability limits for the first time since the 1930's may be disastrous.

First, the structure of the shipping industry is such that alternative freight costs charged by carriers if a value is declared are sometimes prohibitively high.² One possible cause of this is that in the liner trade "a certain inequality of bargaining power between the shipper and the carrier is assumed to exist."³ As of 2007, 25 liner service companies controlled 80% of the world container trade; in contrast, in 2006 the U.S. alone had roughly 239,000 export shippers. For specific routes, the number of carriers are very modest indeed, and with economic retrenchment on the horizon, the numbers will almost certainly get smaller.

¹ Draft Convention, art. 80¶4 (Prohibiting "volume contracts" from opting out of liability only in very limited circumstances).

² See, e.g., *Industrial Maritime Carriers (Bahamas), Inc. v. Siemens Westinghouse Power Corp.*, 67 Fed. Appx. 252, at *1-3 (5th Cir. 2003) (upholding an *ad valorem* rate of 6% of cargo value as reasonable and not a denial of fair opportunity).

³ Mary Helen Carlson, *U.S. Participation in the International Unification of Private Law: The Making of the UNCITRAL Draft Carriage of Goods by Sea Convention*, 31 Tul. Mar. L. J. 615, 625 (Summer 2007).

Second, it is well known that under the present limits of liability prudent shippers normally purchase their own cargo insurance. This is prudent behavior and to insure ones belongings has long been recognized as a social good. However, a classic agent-principal or third-party payment dilemma then comes into play, wherein shippers are in actuality negotiating their liability limits as agents for their absent cargo underwriters, with little immediate incentive on the part of the shippers to negotiate firmly. By the time the principals, the cargo underwriters, see the claims--usually years later--such shipper employees may no longer be a position to be held accountable for their actions. While such a course of conduct should (in theory, and assuming perfect competition) ultimately reach an equilibrium when cargo underwriters adjust their premiums upward to account for the increased exposures, in the meantime, significant societal losses have already been incurred.

Finally, by allowing *de minimus* low liability limits public policy itself is frustrated. Such low liability limits have the unfortunate consequence of stripping much of the incentive for carriers to perform diligently.⁴ Having cargo insurers pay for carrier negligence accomplishes nothing more than to shift the burden of bearing the costs of a carrier's lack of care, caused by underdeterrence, to the buyers of goods. While it is the cargo insurers who in the first instance would foot the bill for such shortcomings, it is the consumers of goods who will ultimately suffer the harm from volume contracts which have no liability floor, in the form of

⁴ This situation is known as "underdeterrence." As explained by Judge Richard Posner in his classic text Economic Analysis of Law (Little Browne, 3rd ed. 1986) at pp. 186 & 187:

To permit the defendant to set up my insurance policy as a bar to the action would result in underdeterrence. The economic cost of the accident, however defrayed, is \$10,000, and if the judgment against him is zero, his incentive to spend up to \$10,000 (discounted by the probability of occurrence) to prevent a similar accident in the future will be reduced.

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If compensation is the only purpose of the negligence system, it is a poor system, being both costly and incomplete. Its economic function, however, is not compensation but the deterrence of inefficient accidents.

increased costs. As the world's largest nation of importers, this in the long run could negatively impact American business.

As an example, domestic air movements in the United States presently move in a de-regulated environment. Shipper's rights for that mode of transport have been severely limited to the extent that sometimes recoveries for large losses *de facto* no longer exist, often being limited to \$100. It is quite likely that with volume contracts such miniscule limits will also become commonplace. For more details concerning this issue, the reader is directed to the article "UN's New Compensation Treaty: Should United States Ratify It?" in the January 7, 2009, edition of The New York Law Journal.

Since the 1930's, shipping has been regulated to require some modest liability floor. There is no real need to now radically deregulate it, and extraordinary risk. The MLA should support the Rotterdam Rules. However, it should ask Congress to ratify them, as was done with US COGSA, as domestic legislation only, and for the United States to modify Article 80, the Volume Contract exception, to prohibit carriers from lessening their obligations.