

UNCITRAL DRAFT CONVENTION ON THE CARRIAGE OF GOODS

THE OUTSTANDING ISSUES

STUART BEARE

In the paper which I presented to the CMI conference in Cape Town in February last year¹ I reviewed the Draft Convention as it stood at that time against the original provisions in the CMI draft. Since then two further sessions of UNCITRAL Working Group III were held last year at which the second reading of the Draft Convention was substantially completed. I prepared my abstract of this presentation on the basis of the position as it stood at the end of the second reading and I identified five principal outstanding issues. The third and final reading began at the session in New York in April this year and I am pleased to say that one issue was resolved and substantial progress was made towards resolving two others. The Working Group did not consider jurisdiction and arbitration. These topics will be discussed at the next session in October in Vienna, when it is hoped that the third reading will be completed.

The issue which has been resolved is the first on my list, freedom of contract. First, the general mandatory scope of application of the Convention set out in articles 5 and 6² was approved. As regards article 88, which renders void any term in a contract which excludes or limits the liabilities of the carrier under the Convention, it was agreed that any term is also void which excludes, limits, or increases, the obligations of the shipper. The parties therefore cannot contractually elevate a fault liability of the shipper up to a strict liability. However, this only applies to those shipper's liabilities that are dealt with in the Convention. As to those shipper's liabilities on which the Convention is silent, such as demurrage, freedom of contract continues to apply.

The debate on freedom of contract principally concerned article 89, which sets out special rules for volume contracts. I outlined the issues which had arisen regarding this topic in my Cape Town paper. A full summary of the various debates in the Working Group is set out in some detail in the report of the New York session which provides a useful point of reference³. The agreement which was finally reached in New York in April 2006 is reflected in the text of article 89. Australia and France sought to reopen the matter at the last session. In particular they wished to narrow the definition of a volume contract, to tighten the formal conditions for the validity of a derogation and to expand the list of matters from which no derogation was permitted. However many delegations pointed out that the agreement reached last year was a carefully crafted compromise and that it was highly unlikely that the Working Group would be able to build an equally satisfactory consensus around a different solution. The Working Group therefore rejected the proposal to reopen the debate on article 89, which was accepted as drafted.

I will only add two personal observations. First, as I pointed out in Cape Town, I doubt whether it would have been very controversial if volume contracts both in the non-liner trade, where they are often described as contracts of affreightment (COAs)

¹ Published in CMI Yearbook 2005-6 at p 394 ff

² References are to the consolidated text of the Draft Convention contained in A/CN.9/WG.III/WP.81

³ A/CN.9/621 paragraphs 161-171

and are not subject to the current regimes, and in the liner trade, were excluded from the Convention. They are negotiated between the carrier and the shipper just as charterparties are negotiated. Nevertheless the shipper under a volume contract in the liner trade has been given some protection by article 89 because the contract either must be individually negotiated, or must prominently specify the section of the contract containing the derogation.

My second point concerns the position of third parties. They are, of course, not a party to the negotiations between the shipper and the carrier and the protection they are given by article 89 is wider. They are only bound by derogations in a volume contract if they receive information that prominently states that the volume contract derogates from the Convention **and** they give their express consent to be bound. I personally believe that in the majority of cases the third party will be either an associate of the shipper, or a customer with whom the shipper has a direct relationship, which may be a long term relationship, under a sale and purchase contract. I think that it will only be in a rare minority of cases that a transport document issued under a volume contract in the liner trade will be negotiated into the hands of a third party at the end of a chain.

The second issue in my abstract is liability for delay. This issue first developed as a major issue in New York last year and I did not refer to it in Cape Town, beyond saying that it had been agreed that the carrier would be liable for delay when the goods were not delivered within the agreed time or, if no time had been expressly agreed, within a reasonable time. The issue developed out of the debate on the obligations and liabilities of the shipper. If the shipper was to be liable under the Convention for delay in furnishing information to the carrier, particularly in the context of current security requirements, that liability, it was contended, could be extensive and could include an indemnity for any payment which the carrier was consequently obliged to make to other shippers. Moreover it would be unlimited. The United States therefore proposed that neither the carrier nor the shipper should be liable for delay.

I will not attempt to summarise the arguments; I would simply refer you to a working paper prepared by Sweden⁴ in which they are clearly set out. At the session in November in Vienna Sweden put forward a compromise, the terms of which were that the carrier's liability would remain as previously agreed, save that an explicit provision would be added exempting the carrier for delay attributable to another shipper, and the shipper's liability, save for inaccurate information, dangerous goods and demurrage, would be capped at half a million SDRs. Suffice it to say that this compromise did not find favour. It was finally agreed that all references to the shipper's liability for delay should be deleted, that the carrier should only be liable when the goods were not delivered within the agreed time and the limit of such liability should be mandatory. The words "unless otherwise agreed" have accordingly been deleted from article 63.

This is one of the two issues on which I think the Working Group made substantial progress, but which it did not completely resolve. As I have said, all references to the shipper being liable for delay will be deleted, so that the Convention will be silent with regard to any liability for delay or consequential damages, but the question arises

⁴ A/CN.9/WG.III/WP.74

whether the terms “loss or damage sustained by the carrier”, or “loss, damage and expenses”, could in some jurisdictions be held to include liability for loss caused by delay. If so, the shipper could still be liable for delay under the Convention and some delegations would like to go further than mere deletion and explicitly exclude liability for delay. In that case would the shipper be relieved of any liability to pay detention during repairs to a ship caused by dangerous cargo? Equally other delegations are concerned that there should be no possibility that the carrier could be held liable for delay (other than damage to or deterioration in the goods caused by delay), save in the limited circumstances where a delivery date has been agreed upon. It is fair to say that not all delegations were happy at the outcome in New York and I expect that there will be further debate. However I am not sure when the debate may be resumed, because the third reading of chapter 8 has been completed and, as I understand it, no further text will be circulated until the final text of the Draft Convention is circulated to governments.

The other issue on which the Working Group has made substantial progress is the door-to-door application of the Convention. First article 84, which deals with a possible conflict with the Montreal Convention, was approved. A suggestion that it should be widened to include other uni-modal conventions was rejected, as the Working Group had already decided in November 2006 in Vienna to delete articles 89 and 90 in WP 56, which related to such other conventions.

Second it was agreed to clarify the limited network system set out in article 26 by including the reference to a hypothetical contract, as in the BIMCO “COMBICON” form of bill of lading. Let me illustrate this by an example. Assume a door-to-door contract for inland carriage from Canada to New York, ocean carriage from New York to Rotterdam and inland road carriage from Rotterdam to Berlin. There is no convention governing road or rail carriage from Canada to New York, so this Convention would apply to the carriage from Canada through to Rotterdam. The question was raised whether this Convention or the CMR would apply to the inland carriage from Rotterdam to Berlin. Not all would agree that the CMR, according to its own scope rules, applies to such international road carriage, because it is arguable that the application of the CMR depends on it being held that the place of receipt of the goods was Rotterdam, whereas the contractual place of receipt under the underlying door-to-door contract was in Canada. However there is no doubt that the CMR would apply to a separate contract for road carriage from Rotterdam to Berlin. Hence including the reference to a hypothetical contract has clarified the application of article 26.

The third outstanding question, and this question has been outstanding since the CMI prepared its draft, is whether the Convention should yield to mandatory national law as well as to a mandatory international convention. If it did, in the example I have given a loss could occur in Canada, New York State, on the high seas, in the Netherlands or in Germany. If the Convention yielded to mandatory national law, the laws of these countries, if they were mandatory, could determine liability. I will again not summarise the arguments on both sides – we heard most of them in the debates in the CMI – because the Netherlands revived a compromise proposal originally made at a very early stage by Canada and this compromise was accepted. Under this compromise a contracting state will be able to make a declaration pursuant to article 94 allowing it to include its mandatory national law in article 26 provided that it

specifically identifies the national law in question, that the law applies to the damage and the damage occurred in that state's territory. Going back to my example, if the Netherlands or Germany made such a declaration and the damage occurred in either of these countries, the declaration would have no effect as the CMR would apply. If however the damage occurred in Canada and Canada made a declaration, a Canadian court would apply the applicable Canadian mandatory law. If the damage occurred in the State of New York, the Canadian court would apply the Convention, even though the relevant Canadian law might purport to have extra territorial application, because the damage did not occur in Canada.

So what is left unresolved? The answer is article 62.2 which provides that the maximum limit which could apply to loss or damage under a door-to-door contract is to apply to non-localised damage, that is when the carrier cannot prove on which leg of the carriage the loss or damage occurred. Despite a prevailing preference in favour of the deletion of the article, it remains in the Draft Convention in brackets because many delegations felt it could not be properly considered until the package and kilo limits, that is the numbers, to be inserted in article 62.1, were agreed. Needless to say this is an outstanding issue.

That leaves jurisdiction and arbitration. I will be brief because I outlined the position in Cape Town and it has not greatly changed, although the drafting of the provisions has been refined. As regards jurisdiction, the provision which permitted a contracting state to give effect to a choice of court agreement that did not meet the criteria for a permitted forum under article 69 by filing a notice has been replaced by a provision allowing a contracting state to make a declaration under article 94 opting out of, or opting in to, whichever is finally agreed, the whole chapter on jurisdiction, or simply excluding article 70, which relates to choice of court agreements. This last choice would amount to a partial opt out, or in.

As regards arbitration, following a joint meeting of experts drawn from Working Group III and Working Group II (Arbitration), the Hamburg Rules formula for determining the place of arbitration in liner transportation has substantially been adopted, and an opt out/opt in provision has been included corresponding with the provisions in the chapter on jurisdiction, but without the possibility of partial opt out/in. I believe that the debate on these topics in October in Vienna will largely concentrate on these issues.

I mentioned earlier that not all delegations were happy at the outcome of the debate on delay. It is of course inevitable that not all delegations will be entirely happy with some of the provisions which are finally agreed upon after this kind of lengthy negotiation. Indeed it is often said by lawyers that when both parties are not entirely happy with a robustly negotiated contract, it is probably a sign that the contract is fair. But in the case of a convention, this is not enough. If states are unhappy with the Convention as it is finally adopted, they may not ratify it. This is a complex Convention and, in my view, it will not sell itself. It must be CMI's hope that it will be ratified by a large number of states so that it does generally supersede the Hague, Hague-Visby and Hamburg Rules to provide an up to date regime for the 21st Century. My personal hope therefore is that when the drafting is complete (probably at the end of this year), National Associations will feel able to conclude that it is a fair Convention, which strikes a fair balance between all the interests covered by it and, in

its innovative chapters, provides practical and workable solutions to many current problems, and will therefore feel able to promote it.